

UNITED STATES

v.

DAVID MATTHEW HICKS
a/k/a Abu Muslim al Austraili
a/k/a Muhammed Dawood

COMMISSIONS HEARING

held at

Guantanamo Bay, Cuba

on

25 August 2004

PERSONS PRESENT:

PRESIDING OFFICER: Colonel Peter E. Brownback III, USA

PROSECUTION COUNSEL: Lieutenant Colonel XXXX,
USMC

ASST PROSECUTOR: Major XXXX, USA

DEFENSE COUNSEL: Mr. Joshua Dratell

ASST DEFENSE COUNSEL: Major Michael Mori, USMC
Major Jeffrey Lippert, USA

MEMBERS: Colonel XXXX, USMC
Colonel XXXX, USMC
Colonel XXXX, USAF
Lieutenant Colonel XXXX, USAF

ALTERNATE MBR: Lieutenant Colonel XXXX, USA

COURT REPORTERS: Gunnery Sergeant XXXX, USMC
Sergeant XXXX, USMC

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INDEX

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RECORD

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Sessions:
 On 25 August 2004 1
 Introduction of Counsel: 1
 Challenges: 106
 Pleas: 122

* * * * *

**REVIEW
EXHIBIT**

DESCRIPTION

Page

1	Appointing Order	1
2	Presidential Order	1
3	Prosecution Detailing	2
4	ACC IMC Request Denial	3
5	Defense Detailing	3
6	Mr. Dratell Notice of Appearance	4
7	Defense Objection Security Personnel	4
8	Charge Sheet	4
9	PO Bio and voir dire Questions	6
10	US v. Hamdan voir dire	8
11	US v. Hamdan sealed voir dire	8
12	PO Selection List	19
13	Members Questionnaires	23
14	Member Instructions	113
15	Defense Continuance Req	120
16	Prosecution Response	120

The Commissions Hearing was called to order at 0931,
25 August 2004.

PO: The military commission is called to order.

AP (Maj XXXX): This military commission is convened by
Appointing Order Number 04-0001 dated 25 June 2004;
copies of which have been furnished to the members
of this commission, counsel, and the accused and
which have been marked as Review Exhibit 1 for
attachment to the record.

The presidential determination that the accused may be
subject to trial by military commission has been marked
as Review Exhibit 2 for inclusion in the record. At
this time, I am providing Review Exhibits 1 and 2 to
the bailiff to be provided to the court reporter.

The charges have been properly approved by the
appointing authority and referred to this
commission for trial. The prosecution has caused a
copy of the charges in English to be served on
counsel for the accused on 10 June 2004 in
accordance with counsel request to personally serve
the accused.

The prosecution is ready to proceed in the
commission trial of United States v. David Matthew
Hicks. The accused, all commission members and the
alternate commission member named in the appointing
order and detailed to this commission are present.
All detailed counsel are present and civilian
counsel is also present.

Gunnery Sergeant XXXX and Sergeant XXXX have
been detailed reporters for this commission and
have been previously sworn. Security personnel
have also been detailed for this commission and
have also been previously sworn.

PO: I have been designated as the presiding officer of
this military commission by the appointing
authority and have previously been sworn. The
other members of the commission and the alternate

member will now be sworn. All persons in the courtroom please rise.

The members were sworn.

PO: The commission is now assembled.

Trial, please state who detailed you and your qualifications.

P (LtCol XXXX): Sir, all members of the prosecution have been detailed to this military commission by the chief prosecutor. All members of the prosecution are qualified under Military Commission Order Number 1, Paragraph 4(b) and have previously been sworn. No member of the prosecution has acted in any manner which might tend to disqualify us in this proceeding. The detailing document is now being marked as Review Exhibit 3 for inclusion in the record, and now providing that to the bailiff.

PO: Mr. Hicks, pursuant to MCO Number 1 you are currently represented by your detailed defense counsel, Major Mori and Major Lippert. They are provided to you at no expense. You can also request a different military lawyer to represent you. Now, if that person is reasonably available, they would be appointed to represent you. If you request another military lawyer and that lawyer is made available then your detailed counsel would normally be excused because usually you are only entitled to detailed or selected counsel.

However, you could request that the appointing authority or the general counsel allow your detailed counsel to stay on the case. You may also be represented by civilian counsel. A civilian lawyer would represent you at no expense to the government and must be a U.S. citizen certified to practice law in a state of the United States, or in the federal court, be eligible for secret clearance, and agree in writing to comply with the rules and orders of the commission. If a civilian counsel comes on the case, your detailed counsel

will remain on.

Do you understand what I just told you?

ACC: Yes, sir.

PO: Do you have any questions about your rights as to representation in this commission?

ACC: No, sir.

PO: Okay. By whom do you wish to be represented?

ACC: By the lawyers present, sir.

PO: Okay. Have you made a request prior to this date for individual counsel, for selected counsel?

ACC: Yes, sir.

PO: Major Mori, can you tell me about the request?

ADC (Maj Mori): Yes, sir. Mr. Hicks requested selected military counsel previously; that request was denied.

Review Exhibit 4 was marked for the record.

PO: Do you have the paperwork on all that?

ADC (Maj Mori): Yes, sir. The defense counsel has previously provided it to the court reporter for attachment to the record as the next review exhibit, sir.

PO: Mr. Hicks, absent the IMC request which was denied, are you satisfied with the counsel who are now representing you?

ACC: Yes, sir.

PO: Okay. Defense, please announce your qualifications and detailing.

ADC (Maj Mori): Yes, sir. All detailed members of the defense team have been detailed to the military commission by the chief defense counsel. All detailed members are qualified under Military Commission Order Number 1, Paragraph 4(C) and we have previously been sworn, sir. No member of the defense team has acted in any manner which might tend to disqualify us from participating in this commission, sir. The detailing letters have been previously provided to the court reporter and asked that it be marked as the next review exhibit, sir.

Sir, now handing the court reporter the extra exhibit.

Review Exhibit 5 was marked for the record.

PO: Mr. Dratell is present in the courtroom. Please rise.

DC (Mr. Dratell): Thank you, Colonel. I am Joshua Dratell, civilian defense counsel, who has been determined to be qualified for membership in the pool of qualified civilian defense counsel in accordance with section 4(C)(3) of Military Commission Order Number 1. I have transmitted my notice of appearance through the chief defense counsel. I have signed the civilian defense counsel agreement to practice before military commission and I have not acted in any manner that may tend to disqualify me to practice in this proceeding.

PO: Have you provided the notice of appearance to the gunny for inclusion in the record?

DC (Mr. Dratell): Yes, it has, Your Honor.

PO: Can you mark that as next in line, Gunny. RE 6.

Civilian defense counsel will now be sworn. Please rise, Mr. Dratell.

The civilian defense counsel was sworn.

PO: All personnel appear to have the requisite qualifications. All personnel are required to be sworn before we proceed. I received this morning a defense objection to placement of security personnel dated the 23rd of August, which was Monday. Is this still a valid something or another?

ADC (Maj Mori): Yes, sir. We would like to note the objection for the record.

PO: You want to argue it, or just note it?

ADC (Maj Mori): Just note it, sir.

PO: Please pass this to the Gunny and this will be the next review exhibit in line.

Trial, have the charge sheet marked as the next review exhibit and attach it to the record please.

P (LtCol XXXX): Yes, sir. I believe we are up to RE 8.

Review Exhibits 7 and 8 were marked for the record.

PO: Defense, have you gotten a copy of the charges already?

DC (Mr. Dratell): Yes we have, Your Honor.

PO: All parties of the trial have been furnished a copy of the charges. Prosecutor, announce the general nature of the charges please.

P (LtCol XXXX): Yes, sir. The general nature of the charges in this case are: Charge I, conspiracy to attack civilians, to attack civilian objectives, to commit murder by unprivileged belligerent, to commit the offense of the destruction of property by an unprivileged belligerent, and to commit the offense of terrorism; Charge II, attempted murder by an unprivileged belligerent; and Charge III, aiding the enemy.

PO: Members, please turn to the package in front of you. You got a copy of charge sheet in there. Take a moment to review the charge sheet and also the appointing order.

The members did as directed.

PO: While reviewing, trial, was the security officer previously sworn? I didn't note that.

P (LtCol XXXX): Yes, sir.

PO: Thank you. All members had a chance to review the charge sheet? Apparently so.

Is the name, rank, and other identifying data of each member listed correctly on the appointing order? Apparently so.

Either party want the charges read? Trial?

P (LtCol XXXX): Prosecution does not, sir.

PO: Defense?

DC (Mr. Dratell): Mr. Hicks does not wish it read here, sir.

PO: Thank you. The reading of the charges may be omitted.

Okay. Members of the commission, and alternate member, the appointing authority who detailed you has the ability to remove you from this commission for good cause. Is any member, or the alternate, aware of any matter that you feel might affect your impartiality, or ability to sit as a commission member? When you answer that question keep in mind you don't want to bias other members? Any member? Apparently not.

Okay. I previously filled out a commission member questionnaire, provided counsel for both sides with

a summarized biography, a list of matters that normally would be asked during voir dire, a document about how I know the appointing authority, and other personnel, and answers to questions suggested by defense counsel. That packet will now be marked as the next RE in line.

Review Exhibit 9 was marked for the record.

Those documents are true to the best of my knowledge and belief.

We had basically two pretrial conferences, present which were defense and trial and myself; and during the course of these proceedings I will be referring to them. If something happened during one of those conferences that I don't cover or you want covered, trial, defense, speak up. Okay.

During one of those, Major Mori, you and I had a discussion on the standard for challenge in the commission proceedings, and you wanted me to articulate what I, as the presiding officer, believed the standard for challenge is; is that correct?

ADC (Maj Mori): Yes, sir.

PO: Referring to MCO Number 1, Paragraph 4(A)(3) which states the qualifications for a member, and then referring to MCO 1, Paragraph 6(B)(1) and (2), I believe that the standard is whether there is good cause to believe that the member cannot impartially and expeditiously provide a full and fair trial to Mr. Hicks. Do you wish, not perhaps at this time, to articulate a different standard to the person who will make the decision in this case?

ADC (Maj Mori): Yes, sir.

PO: At a later time if we have challenges, I will tell you when you have to provide that standard. If I fail to tell you at that time, please remind me.

ADC (Maj Mori): Yes, sir.

PO: Okay. I will, however, permit you latitude in your questioning going towards the area that you want. You are looking for what we commonly called 912(N); right?

DC (Mr. Dratell): Yes, sir.

PO: Okay. Thank you. Does either side want to voir dire me outside the presence of the other members?

P (LtCol XXXX): No, sir.

DC (Mr. Dratell): Yes, sir.

PO: Thank you. Members, please return to the deliberation room.

Be seated. Let the record reflect the members, except for the presiding officer, have left the courtroom.

I noted yesterday that we have a joint problem here. In the Army when a single member walks into the courtroom except for the judge, no one rises. Apparently in the Naval services you all rise. Individual members of the defense and prosecution team may rise or not as they wish when the single member walks in or leaves. It is up to you, but the only requirement is when all the members come in, or I come in, you rise.

I have got a copy of the PE that was just marked -- or RE that was just marked, Number 9 which was my voir dire packet. This morning in that latest conference counsel for both sides were handed a copy of the voir dire up to where we broke for closed session yesterday. Counsel for both sides you both stated you intend to focus the voir dire on the questionnaires, and this is not just for me, it is for the other members too, in what was said in voir dire yesterday and you wish to have appended to the record of trial as RE 10 all

portions of the Hamdan record of trial that were -- don't get excited yet -- that were held during the open sessions concerning voir dire. Which includes -- just a second, Major Mori -- which includes all the voir dire, all the challenges, and then at the end of the day there was a further reopening of voir dire of the presiding officer. That will be RE 10. RE 11 will be the closed session voir dire from Hamdan. I am not going to mix closed and none closed if I don't have to.

Is that what you all wanted, trial?

P (LtCol XXXX): Yes, sir. Except for that it was our understanding that counsel voir dire of the whole panel would also not be --

PO: I said all the voir dire. Everyone's.

P (LtCol XXXX): Yes, sir.

PO: Everything that had to do with the voir dire. You understood what I meant didn't you, Gunny? Yeah, the Gunny knew. We will look at the RE before it is finalized, okay. Is that what you want, defense?

DC (Mr. Dratell): Yes, sir.

PO: Mr. Hicks, you weren't present yesterday during the voir dire; right?

ACC: Yes, sir.

PO: Okay. Your counsel got a copy of the voir dire, somewhere on their thing. They intend to refer to it in questioning me and the other members today to what happened yesterday. You got any objection to that?

ACC: No, sir.

PO: Okay. Trial, voir dire?

P (LtCol XXXX): None, sir.

PO: Defense, go on.

DC (Mr. Dratell): Yes, sir. Colonel, I want to focus first on something that was brought up yesterday with respect to your intention to advise the other members on the law, in addition to also then receiving law from either side. And in your experience as a military judge, would you ever let an attorney sitting on a military jury express an opinion as a lawyer on the law to a jury that is supposed to be made up of equal members?

PO: I have never seen an occasion to have an attorney sit on a jury panel, but no I wouldn't.

DC (Mr. Dratell): Is that what we have here, in essence, a jury of equal members, none of whom should be superior to the other with respect to understanding or expression of the law.

PO: Okay. I will answer your question, but let me say that I believe, and I direct Major Mori to provide a brief on this, Major Mori.

ADC (Maj Mori): Yes, sir.

PO: Because there are two parts to it. The SECDEF has said there is going to be a lawyer on this panel; right?

DC (Mr. Dratell): Yes.

PO: Okay. So you're objecting or Major Mori is writing a motion objecting to the structure of the panel.

DC (Mr. Dratell): That's true.

PO: Okay. That's the structure of the panel. So it doesn't matter in many ways what I think about that because that is a structure that you can bounce me off and I believe that the appointing authority will say, okay, he's bounced and let's put another

lawyer on there. Can we just let that portion of this voir dire sit as a motion to the structure, and now you can ask me what I will do.

DC (Mr. Dratell): And it is not -- it's not simply the structure but it is also your intention to advise the panel on the law, that's part of it. So it's not just that there is a lawyer because there are lawyers that sit on civilian juries all the time, they are just not permitted to advise other jurors as to the law. And that is the province of the judge, and in this situation we don't have a judge. But and in the sense that you have instructed the members that they are not required to follow your expression of the law and they are free to adopt either side's expression of the law, or yours, or their own, but do you acknowledge the possibility, and really the distinct possibility that the members, or any member, all of whom are non-lawyers will give your expression of the law more deference than they will to either counsel, or to their own?

PO: When I see Major Mori's motion, if it is made to me I will be glad to answer the structural question. Now, I will, if you want to say, Brownback, will you tell us that you are not going to provide advice to the panel other than what you do while you are sitting here, that's a different matter. Is that what want, I mean --

DC (Mr. Dratell): No. No, my question is -- and if you consider this a structural question then you do; but my question is really do you acknowledge the possibility that a member or all of the members who are non-lawyers will give your expression of the law more deference than they will to either side's or their own?

PO: If you ask me that, I say yes. I will, however, follow up by saying there is a chance they might give Colonel XXXX's, because he is Marine, or Major Mori's, because he is a Marine, or Major Lippert or Major XXXX, because they are Army, more deference. I don't know the answer to that.

DC (Mr. Dratell): Can you put a civilian on that for me?

PO: That's a structure. Major Mori, make a note, that goes into your brief. Okay. I can't go any farther than that.

DC (Mr. Dratell): You have combat experience from Vietnam; correct?

PO: Yes.

DC (Mr. Dratell): And did you have occasion to engage in combat with the North Vietnamese Army?

PO: At the time I was not worried about where they came from.

DC (Mr. Dratell): But were they regulars from the North Vietnamese Army?

PO: The intelligence reports that we gathered had them classified as both NVA and VC. And when they hit us we didn't stop them to try to figure it out; we just fired back.

DC (Mr. Dratell): But when they were taken prisoner, regardless of whether they were NVA or VC were they treated according to the Geneva Convention?

PO: Yeah.

DC (Mr. Dratell): Now, I want to explore your relationship with the appointing authority.

PO: Okay.

DC (Mr. Dratell): You have known Mr. Altenburg 1977, 1978?

PO: Yes, sometime in that frame.

DC (Mr. Dratell): And you had a professional affiliation for a period of time?

PO: As I said before my knowledge of Mr. Altenburg up until 1992 was minimal, I mean, really. Now he was the SJA of the 1AD, the 1st Armored Division, and I was over on the other side of Germany. We were at Bragg at the same time, but like I said I maybe talked to him once, I think. You see people on post, but that is about it.

He and I were on the same promotion list to major, but he had already left Bragg by then. In 92 he came to Bragg as the SJA and I was the chief circuit judge with my offices right there at Bragg in his building, and my wife was his chief of adlaw. So from 92 to 96 you could say that we had a close professional relationship and within, I don't know, a couple months it became a personal relationship.

DC (Mr. Dratell): And when you retired in May of 1999, Mr. Altenburg presided over your retirement ceremony?

PO: Right, at the JAG school.

DC (Mr. Dratell): And he was also the primary speaker at a roast in your honor that evening?

PO: Yes.

DC (Mr. Dratell): And, in fact, when Mr. Altenburg retired in the summer of 2001 you were the primary speaker at his roast?

PO: No, there were three speakers. I was the only one who was retired and could say bad things about him.

DC (Mr. Dratell): And you also attended his son's wedding in sometime in the fall of 2002?

PO: In Orlando, yeah.

DC (Mr. Dratell): And you also contacted Mr. Altenburg when you learned that he became the appointing authority for these commissions?

PO: Right, I did.

DC (Mr. Dratell): And you are aware that there were other candidates for the position of presiding officer?

PO: Yeah, uh-huh.

DC (Mr. Dratell): Thirty-three others, in fact?

PO: Okay. No. What I know about the selection process I wrote. I don't know who else was considered and who else was nominated. Knowing the Department of Defense I imagine that all four services sent in -- excuse me, that there were lots of nominations and they went somewhere and they got Mr. Altenburg somehow. I don't know how many other people were nominated.

DC (Mr. Dratell): So the ultimate question is how would you answer the concerns of a reasonable person who might say based on this close relationship with Mr. Altenburg that there is an appearance of a bias, or impartiality -- or partiality rather and that you were chosen not because of independence or qualifications, but rather because of your close relationship with Mr. Altenburg, and how would you answer that concern?

PO: Well, I would say first of all that a person who were to examine my record as a military judge -- and all of it is open source. All of my cases are up on file at the Judge Advocate General's office in DC -- could see at the time when I was the judge at Bragg, sitting as a judge alone, acquitted about six or seven of the people he referred to a court-martial. They could look at the record of trial and see that in several cases I reversed his personal rulings. They could look at my record as a judge and see that I really don't care who the SJA was in how I acted. So a reasonable person who took the time to examine my record would say, no, it doesn't matter.

DC (Mr. Dratell): I would like to move on and explore your relationship with Mr. XXXX and his role in the commission.

PO: Okay.

DC (Mr. Dratell): He is presently an employee of the Department of Homeland Security?

PO: Right.

DC (Mr. Dratell): He is senior instructor at the Federal Law Enforcement Training Center?

PO: Right.

DC (Mr. Dratell): And his long-term career goals is to remain with the Department of Homeland Security in that position?

PO: I don't know.

DC (Mr. Dratell): Have you seen the detailing memorandum?

PO: Yes -- but I didn't -- I mean it was a detailing memorandum. I don't know if those are his long-term goals. Do you mean does he intend to return there after the detail is over?

DC (Mr. Dratell): Yes.

PO: Yes. He bought a house there about three years ago and he probably hasn't made enough money to leave yet.

DC (Mr. Dratell): But, in fact, arrangements have been made so that he is still an employee and he is essentially on loan here part-time.

PO: He is on a detail. Right, they are offering various positions, you know, for GS-14s and 15s but he didn't want to do that, right.

DC (Mr. Dratell): So how would you answer concerns of

reasonable person that the Department of Homeland Security employee is acting as a legal advisor or the assistant to the presiding officer of this commission?

PO: He is an instructor in the legal department to the best of my knowledge. He has never had anything to do with operational activities. He instructs people on the application -- and you would have to look at whatever he wrote. I believe -- he does a lot of Fourth Amendment law and probably some Fifth Amendment law and maybe procedures. Both of which, or all of which, has nothing to do with operational activities. It is how to keep activities within the bounds of the constitution, none of which has he applied in doing what he is doing for me. So I don't see any harm. I mean you are characterizing him correctly as a Department of Homeland Security; however, I believe when he took the job FLETC, the Federal Law Enforcement Training Center, didn't belong to DHS because there wasn't a DHS. I think it was a DoJ, but it may have been something else. I don't believe there is any concern there. He is not knocking down doors or searching people out. He is in Brunswick, Georgia teaching classes.

DC (Mr. Dratell): But he is still affiliated with a law enforcement and homeland security organization which is essentially tasked with terrorists -- terrorism enforcement activities.

P (LtCol XXXX): Sir, I am going to object to this line of questioning at this point. This does not go toward any potential bias on your part or anything that might lead to that.

PO: That's okay. Thank you. Go on. I hear what you are saying, Mr. Dratell. I don't believe that a reasonable person who heard that a person who instructs in the law at a law enforcement -- federal law enforcement training center is actually an operative of the DHS who is kicking down doors. But that is -- reasonable people can differ. That's my opinion.

DC (Mr. Dratell): With respect to his role in the commissions, in the August 19th memorandum from the appointing authority it says that he is to provide advice in the performance of presiding officer adjudicative functions. Can you tell us what that means, adjudicative functions?

PO: Would you do me a favor. Who signed that?
Mr. Altenburg, right?

DC (Mr. Dratell): Yes.

PO: Did I sign it?

DC (Mr. Dratell): No.

PO: Okay. I don't know what that means and I am exploring with you as we go what that means. I tell you, if you want to know what he does for me I will be glad to tell you.

DC (Mr. Dratell): I am just more interested in what the interpretation of this phrase is.

PO: I don't know what it means. If it means does he -- this morning you know, Mr. XXXX, would you go find counsel for both sides and tell them I am ready to see them. Because that -- that is not adjudicative. He has not provide -- I will tell you this, he has not provided me any piece of advice on any item of substantive law. Now there are those who would say that writing up motions, you know, the presiding officer memorandum and stuff like that is substantive; I don't believe they are. The things that he has done have nothing to do with substance and I have not yet gotten to an adjudicative function as far as I can tell.

DC (Mr. Dratell): Well, will he? The question is under this memoranda will he be involved, and particularly in light of what you are saying is his experience in what he teaches and whether that is going to have an impact on the rest of the members,

that is the questions now.

PO: Was the question then to make Colonel XXXX happier? Am I going to take improper advice in my role as a member from someone who is not a member?

DC (Mr. Dratell): Advice.

PO: That's what I say advice.

DC (Mr. Dratell): But you said improper and I say any advice or any advice that any of the members get either from you or directly from Mr. XXXX --

PO: No, they are not.

DC (Mr. Dratell): Now with respect to -- well, if that role changes, or is there -- are we ever going to get a definition of those terms adjudicated function in a matter that we can at least get our hands around, or for you to get your hands around so that we know what it means?

PO: Probably on Tuesday after I get home, after I finish up this week's session, I will inquire from Mr. Altenburg what he means by that.

DC (Mr. Dratell): And will we be --

PO: I haven't sent anything to Mr. Altenburg, nor has Mr. XXXX, or anyone else that hasn't been furnished in voluminous copies to every counsel; right?

DC (Mr. Dratell): And so in your questionnaire you own a Koran.

PO: Yes, I do.

DC (Mr. Dratell): Have you studied it?

PO: I wrote in there also that I would not call myself a student of the Koran. I have looked at it. It was given to me in Saudi by one of the Saudis with

whom I worked, and he referred me to some verses, and I looked at them. If you have ever been in Dhahran at night there is not a lot to do on the air base there.

DC (Mr. Dratell): And I assume it is in English?

PO: It is a --

DC (Mr. Dratell): Combination.

PO: One side is English and one side is Arabic.

DC (Mr. Dratell): And you obviously read the English side and not the Arabic side.

PO: Yes. Obviously, I read the English side, not the Arabic.

DC (Mr. Dratell): Thank you, sir. I have nothing further.

PO: Thank you. Trial?

P (LtCol XXXX): Yes, sir. First of all on the advising the members on the law, do you -- will you be able to give all the members equal voice regardless of rank or their legal background they may or may not have?

PO: In the military order the President said that the commission is to be the triers of fact and law. That's what he wants and that is what we are going to give him. Yes.

P (LtCol XXXX): Regarding the relationship with Mr. Altenburg, first of all if you are looking at your record he would note that you had combat experience as an infantry officer in Vietnam. Is that right, sir?

PO: Yes.

P (LtCol XXXX): You have five bronze stars; is that right, sir?

PO: Yeah.

P (LtCol XXXX): He would also note that you had ten years experience as a military judge?

PO: Right.

P (LtCol XXXX): Sir, as a military judge did you have occasion to know the convening authority?

PO: Yeah, right.

P (LtCol XXXX): Did you ever have the occasion to be friends with the convening authority?

PO: I say the only friend I was with was a guy who ran a special court once down in Vincenza. We aren't friends really with three star and two star generals when you are a light colonel or colonel, but if you are talking about a personal acquaintance where I knew them, yeah. I wouldn't call myself and General Luck or General Keene, or -- I wouldn't call us friends, you know.

P (LtCol XXXX): They were acquaintances like that?

PO: Right.

P (LtCol XXXX): How did you handle that situation? I am sure that you were impartial and fair?

PO: I never worried about it. I just did my job, my duty.

P (LtCol XXXX): Sir, do you care what Mr. Altenburg thinks about any ruling or decision you might make?

PO: No. You want to ask what I think Mr. Altenburg wants from me?

P (LtCol XXXX): Do you know, sir?

PO: No, I asked would you like to ask me what I think

he wants?

P (LtCol XXXX): Yes, sir.

PO: Okay. I think John Altenburg, based on the time that I have known him, wants me to provide a full and fair trial of these people. That's what he wants. And I base that on really four years of close observation of him and my knowledge of him. That's what I think he wants.

P (LtCol XXXX): Do you think there would be any repercussions for you if he disagreed with a ruling of yours or a vote of yours?

PO: You all went to law school; right?

P (LtCol XXXX): Yes, sir.

PO: Remember that first semester of law school and everyone is really scared?

P (LtCol XXXX): Yes, sir.

PO: Well, I went on the funded program and all the people around me were really scared, but I said to myself, hey the worst that can happen is I can go back to being an infantry officer, which I really liked. Well the worse thing that can happen here, from you all's viewpoint, if you think about that, is I go back to sitting on the beach. I don't have a professional career. Mr. Altenburg is not going to hurt me. Okay.

P (LtCol XXXX): Yes, sir. Nothing further, sir.

DC (Mr. Dratell): Just one thing, sir.

PO: Sure.

DC (Mr. Dratell): With respect to -- I don't know where this was part of the packet --

PO: That's all right.

DC (Mr. Dratell): This is the list of the nominees for presiding officer. I don't know if it is already in the packet, but if not we could just mark this as an RE.

PO: I haven't seen it, but you may mark it as an RE.

DC (Mr. Dratell): Okay, and that would be RE -- is that 13 that we are up to?

AP (Maj XXXX): Colonel Brownback, I just note that that is an attachment to our defense filed motion that is presently before the court.

PO: We will just do this and we can put it in the next one.

Review Exhibit 12 was marked for the record.

ADC (Maj Mori): Defense counsel has provided the court reporter with the two sheets of the list of selection for the presiding officers.

PO: Okay.

DC (Mr. Dratell): I have nothing further, sir, thank you.

PO: Prosecution, challenge?

P (LtCol XXXX): No, sir.

PO: Defense?

DC (Mr. Dratell): Yes, sir, on the same grounds basically yesterday that we explored again today which is the relationship with the appointing authority and also on the -- also on the advice to the commission members on the law and also --

PO: Okay. Just a second.

DC (Mr. Dratell): And also the lack of definition of Mr. XXXX's role and impact that that would have on

both on the presiding officer and the commission as a whole, the other members here individually who are in combination.

PO: Okay.

DC (Mr. Dratell): And also the ground that was raised yesterday with respect to the speedy trial issue and comments either were or were not made I was not at the meeting so it was impossible for me to say --

PO: Predisposition?

DC (Mr. Dratell): Yes, exactly.

PO: Okay, what else?

DC (Mr. Dratell): That's it.

P (LtCol XXXX): Yes, sir, the government opposes that challenge. First of all, the role of Mr. XXXX we believe is just an objection to Mr. XXXX's role. There's no evidence that affects your impartiality and in fact throughout this it's clear that we have gotten a very independent presiding officer who is not swayed, certainly would not be swayed by Mr. XXXX and he does not and has not provided legal advice, is not providing legal advice. We do not believe that is any real basis for challenge of you, sir.

The relationship with Mr. Altenburg we believe that is not problematic. Again, we have a very independent presiding officer. Mr. Altenburg is looking at various people as candidates and he comes across somebody who happens to know his reputation, sterling reputation as a military judge. He is looking at a military record and has seen combat experience in Vietnam, he has seen five bronze stars, heroism in Vietnam, somebody that can stand and not be afraid to say no to Mr. Altenburg or anybody else.

PO: I appreciate the comment, but I would have the gunny note that I don't agree with heroism in Vietnam, but go on.

P (LtCol XXXX): Yes, sir. We would also note ten years as a military judge. That makes a presiding officer stand out with somebody who has an exceptional amount of experience as the military judge and that's somebody who knows how to maintain integrity and independence. And we believe that there is no grounds for your challenge, sir.

DC (Mr. Dratell): Thank you, just so I can articulate two subsets of the challenges. One is that with respect to the relationship with Mr. Altenburg. It is also with respect to the perception of the public, the panel.

PO: Major Mori's 912(N)?

DC (Mr. Dratell): Yes, that's correct.

PO: He is writing a motion on that.

DC (Mr. Dratell): And the same with respect with Mr. XXXX as a result of his employment with the department of homeland security and his position there and so those are in conjunction with the substantive.

PO: Okay.

P (LtCol XXXX): Well, sir, first we don't accept that as the standard and second of all we don't see how that is such a bad appearance. Someone who has been a district attorney becomes a judge. Does that mean that he is biased? So somebody who works at FLETC who is now helping administrative matters now for the commission. How is that a bad appearance. And your appearance with your background and experience as a presiding officer we do not feel that there is any bad appearance on that.

DC (Mr. Dratell): Just that -- we don't have a situation

where someone was a district attorney and is now a judge, we have someone who is still a district attorney and is now the assistant to a judge who may have adjudicated functions in a commission process.

PO: Okay. I have considered the challenges made by the defense. I am going to forward a transcript of voir dire which contains a reference to RE 12, so that will go along with it. The transcript -- that will include the transcript of the challenge and the prosecution's response. In addition, Major Mori, that motion on the 912(N) matters and your motion on the adjudicative function advice and your motion on the impropriety of the presiding officer providing legal advice -- you understand what I am saying?

ADC (Maj Mori): Yes, sir.

PO: Can you have those to opposing counsel by the 7th? You notice how much time I am giving you, for me that is a heck of a long time. And that way they can comment -- no, so this will get up to Mr. Altenburg all at the same time so he can consider your request for a different standard -- for a standard so he can consider your motion concerning whether or not I should provide advice and your motion concerning the adjudicative advice all at the same time. You get it on the 7th, trial, and you have it back to, your comments ready by the 10th and I will try to get all of this stuff in to Mr. Altenburg on the 10th because he is the one that makes the decision.

ADC (Maj Mori): Yes, sir.

PO: Okay.

P (LtCol XXXX): Yes, sir.

PO: Okay. Under the provisions of MCI 8(3)(A)(3), I am not going to hold the proceedings in abeyance. Now, before I call the members in I am going to ask

this question; who is lead?

DC (Mr. Dratell): I am lead.

PO: Okay. I am going to tell the members that when they come back in. Okay?

DC (Mr. Dratell): Yes, sir.

PO: I am going to call the members in and then we will go through voir dire with them generally, okay? Ready? Call the members.

Please be seated. The commission will come to order. Let the record reflect that all the parties present when the commissioned recessed are once again present.

The members are present.

Mr. Dratell, you are the lead attorney for Mr. Hicks; correct?

DC (Mr. Dratell): That's correct, sir.

PO: That means, members, generally when I call on the defense, generally he will be speaking for the defense. However, if Major Mori or Major Lippert have been cast they may pop up too.

Have all members completed a member questionnaire? Apparently so.

Both sides have been provided a copy of those questionnaires?

P (LtCol XXXX): Yes, sir.

DC (Mr. Dratell): Yes, sir.

PO: Apparently so. Trial, please have the a questionnaires marked as the next RE.

P (LtCol XXXX): These will be marked 13 Alpha through

Echo at this time.

PO: Those questionnaires will be sealed.

Members, there has been an objection to my instructing you that I will instruct you and advise you on the law. I have not granted that objection, but I am telling you that a motion will be forthcoming on that objection that you all will be seeing at some later time. Keep it in mind. Right, defense?

DC (Mr. Dratell): That's correct, sir.

PO: Okay, members, several of you indicated in your questionnaires that you had some apprehension for the safety of your families because of your participation in this military commission and the release of your names to the public. I can't go back and unbell that cat. But do all members recognize that it wasn't the trial or defense that released your name? Apparently all members recognize that.

Will the release of the names, of your names, affect in any way your ability to listen to the arguments of trial and defense and serve as a member in according to your duty in this case? Apparently not.

Counsel, you both stated that you intend to refer the voir dire in case of U.S. v. Hamdan and focus question to the members based on that voir dire. This is the same, this is RE 10 and 11. You all still going with that?

P (LtCol XXXX): Yes, sir.

DC (Mr. Dratell): Yes, sir.

PO: Mr. Hicks, once again this is the exhibit that counsel have in front of you. You weren't here, but Mr. Dratell -- some member of the defense team was here for all voir dire; right?

DC (Mr. Dratell): That's correct, sir.

PO: Do you object to them basing their questions on this?

ACC: No, sir.

PO: Okay. Okay, Members, I asked you all several general questions yesterday. Any member want to change the answer to any of those general questions I asked about your participation? Apparently not.

Members, right now I do ask you this, probably the most important question of all of the voir dire: Does each member understand that he must disregard anything that he may have been exposed to in any way and decide the case of the United States v. Mr. Hicks solely on the evidence and the law presented to you in this courtroom? Apparently all members understand that.

Members, if counsel ask you a question and it is going to take you into a classified area -- you all know where that is, they don't, so it is on you to say can I hold that for a closed session. They aren't going to keep reminding you of that. Apparently all members understand that.

General voir dire, trial?

P (LtCol XXXX): Thank you, sir. Gentlemen, I am Lieutenant Colonel XXXX, U.S. Marine Corps. At the table with me is my co-counsel, Major XXXX and my paralegal, Staff Sergeant XXXX. Together we represent the United States of America in this case.

Just a couple questions. First of all, since arriving here at Guantanamo Bay and up to the present has any member been contacted by the media, any contact with any media?

PO: Apparently not.

P (LtCol XXXX): Anticipating the trial date may be in January and there may be further trips to Guantanamo Bay, is there anything in any member's professional or personal life that may impact their ability to act as a member?

PO: Apparently not.

P (LtCol XXXX): Does any member receive, have any specific briefs, information of, have any knowledge specifically about the facts in this case?

PO: Other than what you received in the packet before you? Apparently not.

P (LtCol XXXX): Each side in this matter is entitled to a fair trial and this of course will require your focused attention. Now, is there anything at all in anybody's background or life or otherwise that may interfere with your ability to give each side a fair trial?

PO: Apparently not.

P (LtCol XXXX): That's all I have, sir.

PO: Mr. Dratell?

DC (Mr. Dratell): Good morning, I am Joshua Dratell. I am civilian defense counsel for Mr. Hicks seated here next to me. Also are detailed defense counsel Major Michael D. Mori, United States Marine Corps, and Major Jeffrey Lippert, United States Army. Major Mori will conduct the joint voir dire of the commission members. Thank you.

ADC (Maj Mori): Good morning, members. Do all members agree that the President has ordered that Mr. Hicks be provided a full and fair trial?

PO: Apparently so.

ADC (Maj Mori): Colonel XXXX, in your opinion what would

be required for a fair trial?

CM (Col XXXX): I believe first and foremost a fair trial must be transparent and understandable to both the public and the defense and the prosecution. I think a fair trial must also include members of this commission to be fair and open minded and judge this case on the merits that are presented before us and not any external information that may have been gathered by the commission by some other means.

ADC (Maj Mori): Do you think it is important to have live witnesses here so that the defense can confront witnesses against Mr. Hicks?

CM (Col XXXX): I think that would be your choice on that and if you choose to do that we will listen to that openly, with an open mind and understanding, to try to understand it.

ADC (Maj Mori): Do you think to be a fair trial it would be fairer if witnesses were brought here to testify against Mr. Hicks vice --

PO: Yes, Colonel XXXX?

P (LtCol XXXX): I am going to object, sir, this is argumentative.

PO: Let's let him argue just for a second. Okay?

ADC (Maj Mori): -- vice just a piece of paper that the defense couldn't ask questions of?

CM (Col XXXX): My personal opinion, the ability to look at somebody and hear their answers is probably advantageous for me to better understand the facts in the case. Whether that's the case or not because of the logistics I can't say. I will just -- I will judge the facts as they are presented to me in either way.

ADC (Maj Mori): Do all members agree with what Colonel

XXXX expressed?

PO: Apparently so.

ADC (Maj Mori): Would all members agree that it is important for a fair trial for both sides to have access to the same evidence?

PO: Apparently so.

ADC (Maj Mori): Would all members agree to have a fair trial, it is important to have both sides to have sufficient time to prepare and investigate the case?

PO: Apparently so.

ADC (Maj Mori): Do all members understand that it is more difficult to go back and investigate things that have occurred after a substantial period of time from that event?

PO: Apparently so.

ADC (Maj Mori): And that delay, that time period may cause the need to conduct more work and investigation?

PO: Apparently so.

ADC (Maj Mori): Does every member agree that to have a fair trial and hold someone responsible for their conduct that it is only fair that that person know, before they do something, that it is a crime?

PO: We have a question from Colonel XXXX.

CM (Col XXXX): Sir, I believe that you are asking me to interpret whether the law is valid or not and I don't think in this forum right now that we should answer that question.

ADC (Maj Mori): Sir, I am not asking to interpret the law. I am asking -- looking more to judge and to look at the members' individual views and how their

individual view would be. That's really what I am asking right now to determine --

CM (Col XXXX): Sir, in my person opinion, ignorance of the law is not a defense.

ADC (Maj Mori): Does any other -- does any member believe that it wouldn't be fair to hold someone responsible for doing something when they had no idea that it wasn't criminal.

PO: You got the panel -- at least you got the presiding officer confused on that one. Members, do all members agree that if the legislature of Florida if I was hula-hooping in Orlando on the 1st of July 2001 and on the 1st of January 2002 the legislature of Florida passed a law saying that hula-hooping as of January 1, 2000 was unlawful, would you all agree that's bad, makes it an ex pos facto law? Apparently all members agree with that. There, can you state --

ADC (Maj Mori): Yes, sir. I should have put it simply, sir. Do you think that the principles or does any member believe that the principles of freedom of speech, racial equality, liberty, and justice are principles that only belong to America or do they belong to all of mankind?

PO: What do you mean by that? I am really asking, what do you mean?

ADC (Maj Mori): Are those principles that in the individual members' views apply only to Americans or to all people in the world?

PO: You mean do the members -- do you mean does Brownback wish that everyone in the world had all those freedoms that you just talked about?

ADC (Maj Mori): Yes, sir.

PO: Yes, I do wish that everyone in the world had all those freedoms that you talked about.

ADC (Maj Mori): All members agree?

PO: Apparently so.

ADC (Maj Mori): And do you think it would be fair to hold conduct committed by a non U.S. citizen not of the United States and condemn that conduct when U.S. citizens could do that conduct in the United States and would not be condemned.

P (LtCol XXXX): Sir, I am going to object again. This is just not narrowly focused to determine whether there is any bias on any part of the member.

PO: Go on. If you can make them understand that question, then you can ask it.

ADC (Maj Mori): In conduct, is it fair for conduct committed by a non-U.S. citizen in another country, for the U.S. to condemn that conduct; yet, if a U.S. citizen did it within United States it would not be a crime. Do you think that is fair?

PO: I cannot answer that question. Members, can you all answer it?

CM (Col XXXX): Not yet.

CM (Col XXXX): I don't understand the question. Give me an example.

ADC (Maj Mori): Yes, sir. Sir, if I may --

PO: Excuse me, that is Colonel XXXX and Colonel XXXX said, not yet.

ADC (Maj Mori): Whatever it was that a U.S. citizen in the United States could do something and would not be a crime, do you think it would be unfair for the United States to say that if a non-U.S. citizen did it in another country to say that that conduct was criminal even though for a U.S. citizen to do it in the United States it was legal? To impose higher

standards on non-U.S. citizens and not in the U.S?

PO: Who are you asking the question of, Colonel XXXX?

ADC (Maj Mori): Yes, sir.

CM (Col XXXX): Make sure I understand your question. You are saying if a law did not cover a U.S. citizen and he did something in the United States clearly he would not be held accountable for that action; correct?

ADC (Maj Mori): Yes, sir.

CM (Col XXXX): I am dissecting your question. So if that same person was not a U.S. citizen, conducted that same act in another country, be it his own or some other country other than the United States, should the United States hold that individual accountable for that action?

ADC (Maj Mori): Yes, sir.

CM (Col XXXX): Is that a fair representation of your question?

ADC (Maj Mori): Yes, sir.

CM (Col XXXX): As far as U.S. law do I think it would be fair to hold them accountable, no, I don't think that would be fair. Would I -- if he fell under the jurisdiction of international law or for whatever reason fell under the jurisdiction of the U.S. then clearly because he is outside of the continental United States, then yes, I do think it would be fair to hold him accountable.

ADC (Maj Mori): Do all members agree with Colonel XXXX's interpretation? (Indicating) Thank you, sir.

CM (Col XXXX): You're welcome.

ADC (Maj Mori): Do all members agree that it is important for soldiers to distinguish themselves from

civilians in combat zones?

PO: Apparently so.

ADC (Maj Mori): Lieutenant Colonel XXXX, how would you expect a soldier to distinguish themselves from civilians?

CM (LtCol XXXX): I only speak for the United States, but the distinct uniforms, for example American flag patch, something that separates you as an American soldier.

ADC (Maj Mori): Would you expect different countries to have different ways to distinguish themselves?

CM (LtCol XXXX): Different countries, yes.

ADC (Maj Mori): And different cultures?

CM (LtCol XXXX): Well, that wasn't the original question.

ADC (Maj Mori): I know. I am just adding to that. Would you expect different cultures to have different ways to distinguish themselves, cultural differences?

CM (LtCol XXXX): Cultural differences, yes.

ADC (Maj Mori): Do you think a soldier can distinguish themselves from civilians by what their actual conduct they are engaged in could distinguish them, sir?

CM (LtCol XXXX): Yes.

ADC (Maj Mori): Such as flying a plane would be obvious that you are in a military marked plane?

CM (LtCol XXXX): Correct.

ADC (Maj Mori): Do you think being in a trench, front-line area would distinguish --

P (LtCol XXXX): Sir, I am going to object again. I mean the proper way to litigate this case is to put on the evidence, argue what we think the law says and then make argument at the end of the case. The defense counsel is attempting to argue his case, his entire case to the panel and trying to get -- trying to elicit an opinion on something that they have heard no evidence on, not seen the law on, and it is the unfair way to hold these proceedings.

PO: Thank you. Members, you all are being asked an opinion. Does any member believe that they are as they sit here right now an expert on the law of war, law of armed conflict, international law or whatever law you are going to be looking at? Apparently not. Go on.

ADC (Maj Mori): Yes, sir. Would all members agree with the principle that actions speak louder than words?

PO: Speaking for myself I agree with that as a general rule.

ADC (Maj Mori): As a general rule, is there any member who disagrees with that as a general rule?

PO: Apparently not.

ADC (Maj Mori): Does any member have any knowledge regarding the conflict in Kosovo in the late 1990s?

PO: Generalizing knowledge, I was stationed in Germany at the time. We had troops there in Germany.

ADC (Maj Mori): What period of time, sir?

PO: I got to Germany in '96 and I left Germany on the 23rd of May 1999.

ADC (Maj Mori): You had no knowledge, actual involvement of support of operations or --

PO: I sent a judge there.

ADC (Maj Mori): Any other member have any knowledge about any conflict in Kosovo?

Negative response from all members except the presiding officer.

Does any member have any knowledge about the conflicts in Kashmir between Pakistan and the government and the Indian government?

PO: Are you talking about any knowledge other than generalized?

ADC (Maj Mori): Just general knowledge, any knowledge at all?

CM (Col XXXX): You mean do we know what had happened?

ADC (Maj Mori): It exists, yes, sir.

CM (Col XXXX): Yes.

PO: Does any member not know that there is conflict in Kashmir? Apparently all members have read some records of it.

ADC (Maj Mori): Beyond just generalized specialized knowledge, has any member received any specialized reports, briefs, read any articles or any books on it?

PO: Apparently not.

ADC (Maj Mori): Are all members aware that they are appointed to four military commissions that are occurring at the same time?

PO: All members know you are here. You have been appointed to four military commissions. They are occurring seriatim, not at the same time. I am not holding a joint military commission.

ADC (Maj Mori): Yes, sir. One after the other?

PO: Right.

ADC (Maj Mori): As you are deciding issues of law for the first times, do you believe it will be difficult to keep legal issues separated from the different commissions?

PO: Apparently not.

ADC (Maj Mori): Colonel XXXX, you say no. Why do you feel confident in that?

CM (Col XXXX): I work in the XXXX career field and I run an organization for 300 people and spend about 800 million dollars a year. I have many, many, many issues on my table at one time in any given day. I can keep those separate and believe me these four cases I can keep the facts separated.

PO: And the law?

CM (Col XXXX): And the law.

ADC (Maj Mori): Do you think it makes it difficult when you have to hear the cases if the cases are heard right one after the other the one day to the next day versus if there were breaks in between?

PO: Are you asking Colonel XXXX or the panel?

ADC (Maj Mori): Yes, sir. I'm sorry.

CM (Col XXXX): It won't make a difference to me.

ADC (Maj Mori): Does any member feel it might be difficult to keep the facts or legal issues separate from the four different commissions?

PO: Apparently not.

ADC (Maj Mori): Does any member believe that having members, different members sit on four -- the four different commissions would be fairer?

PO: Does any member believe that that's their decision to make?

Apparently no member believes that's their decision to make.

ADC (Maj Mori): Yes, sir. Sir, one second please.

PO: (Indicating)

ADC (Maj Mori): Sir, no further general voir dire questions.

PO: Colonel XXXX?

P (LtCol XXXX): Yes, just one question. Will all members be able to keep an open mind and consider evidence as presented and consider the law as it is presented and make that fair determination?

PO: Apparently so from all members.

I intend to allow and conduct question of members outside the presence of other members. Does any member or any counsel object?

P (LtCol XXXX): No, sir.

DC (Mr. Dratell): No, sir.

PO: Members, we are about to go into individual voir dire. Under the rules I am required to determine what matters to consider concerning a challenge if one were to be made against any member, including myself, should be forwarded to the appointing authority for his decision. I am also required to determine if the proceedings should be held in abeyance while challenge is being ruled upon and also require to determine to keep the voir dire in proper bounds. That's why I will be remaining in the courtroom for individual voir dire.

We are going to recess for 15 minutes and start up in 15 minutes. I will come in and we will bring in

the first individual member. Okay?

P (LtCol XXXX): Yes, sir.

DC (Mr. Dratell): Yes, sir.

PO: The court is in recess.

The Commission Hearing recessed at 1051, 25 August 2004.

*The Commissions Hearing was called to order at 1114,
25 August 2004.*

PO: Please be seated. The commission will come to order. Let the record reflect that all parties present when the commission recessed are once again present. We have a new court reporter, Sergeant XXXX who's been previously sworn. The commission members, other than myself and Colonel XXXX, are not in the courtroom.

Trial, individual voir dire of -- oh, I'm providing Colonel XXXX a copy of his questionnaire which was previously marked as an RE. Trial.

P (LtCol XXXX): Sir, we have none other than that which was already asked yesterday.

PO: Defense?

DC (Mr. Dratell): Yes, we do, sir, if I may. Good morning, Colonel XXXX.

CM (Col XXXX): Good morning.

DC (Mr. Dratell): Yesterday there was some discussion. I am sure if it was with you specifically, but it was certainly with all the members and it was again this morning about limiting your consideration to what the evidence is in this case with respect to Mr. Hicks. You also understand that the charge sheet has no evidentiary value at all?

CM (Col XXXX): Yes, of course.

DC (Mr. Dratell): And you give it no weight?

CM (Col XXXX): Correct.

DC (Mr. Dratell): And with respect to the facts, in terms of the President's order declaring Mr. Hicks eligible for this commission, as a factual matter, has no weight whatsoever in this proceeding?

CM (Col XXXX): Correct.

PO: Would you -- let me just -- it has weight as to whether or not he was jurisdictionally brought here correctly under the requirements.

DC (Mr. Dratell): But I mean as a matter of evidentiary fact in the context of the elements of the offenses.

PO: Yeah.

DC (Mr. Dratell): And you have been involved in courts-martial in your career in the military?

CM (Col XXXX): Yes.

DC (Mr. Dratell): As a member of the court-martial -- as a juror rather?

CM (Col XXXX): I've been a juror. I've been a witness. I've been a special court-martial convening authority on two different periods.

DC (Mr. Dratell): And you've never acted as judge though?

CM (Col XXXX): No.

DC (Mr. Dratell): And have you ever been involved in more than one court-martial at a time with a similar set of facts or a similar set of legal issues.

CM (Col XXXX): As a convening authority, yes.

DC (Mr. Dratell): But have you had to make determinations of fact or law about separate courts-martial at the same time, the way you will in this case?

CM (Col XXXX): That's -- as a captain, I ran numerous summary courts-martial, where as the summery court-martial officer you are making determinations of fact and law. I would -- it's been a long time, but I'm almost positive that I ran more than one summary courts-martial at the same time.

DC (Mr. Dratell): Can you tell us how -- and Colonel XXXX did during the group voir dire, but could you tell us how for yourself you will keep all of these cases and all of the facts and legal issues separate so that you can make an individualized determination as to each person before you?

CM (Col XXXX): The same way that I keep other important matters in my duties as a commissioned officer separate.

DC (Mr. Dratell): And do you also understand that these proceedings may last longer than the average court-martial, the trials of these cases may go well beyond what an ordinary court-martial may last in a day or two days that these may go on for several weeks?

CM (Col XXXX): Yes.

DC (Mr. Dratell): And you understand that that may make it more difficult to compartmentalize, properly?

CM (Col XXXX): I think that's a matter of opinion. If I have to just concentrate on four separate things over an extended period of time it is probably less than what I do on a daily basis than duties right now.

DC (Mr. Dratell): And I know you've read MCO Number 1 -- and you have, I assume?

CM (Col XXXX): Yes.

DC (Mr. Dratell): Because I know it's part of the package that you have been given. And you don't have to worry about it and I'll read you the section it talks about the admissibility of evidence. It's 6(D)(1), Military Commission Order Number 1, and it says evidence shall be admitted if in the opinion of the presiding officer, parentheses, or instead if any other member of the commission so request at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of that commission, close parentheses, the evidence would have a probative value to a reasonable person.

Now, that section essentially leaves to the presiding officer the question of admissibility unless a member requests a vote of the entire commission on that piece of evidence. Is that the way you understand it?

CM (Col XXXX): Can I see it?

DC (Mr. Dratell): Sure.

PO: I'm passing it to him.

Colonel XXXX viewed the document.

CM (Col XXXX): Yes, sir.

DC (Mr. Dratell): And essentially, what that does it gives the commission at the request of a single member of the commission to override the decision of the presiding officer on a question of admissibility of evidence.

CM (Col XXXX): Yes.

DC (Mr. Dratell): And are you prepared to exercise that responsibility when you deem it appropriate?

CM (Col XXXX): Yes.

DC (Mr. Dratell): And are you prepared to do that in an affirmative way and not necessarily to wait and look around for the other commissioners to see whether they are all in agreement to do that when you feel it is appropriate to do so?

CM (Col XXXX): Of course.

DC (Mr. Dratell): Now, we've also had discussed -- and the presiding officer mentioned it this morning -- that he will from time to time advise the remaining commission members on legal issues. He also said you're free to accept it, to accept that of counsel, to accept your own opinion as to legal issues. You recall that obviously?

CM (Col XXXX): Yes.

DC (Mr. Dratell): And you're not a lawyer?

CM (Col XXXX): No.

DC (Mr. Dratell): Have you had any kind of specialized legal training of any kind?

CM (Col XXXX): Military.

DC (Mr. Dratell): And what would that be?

CM (Col XXXX): Senior Officer's Legal Courses, things of that line.

DC (Mr. Dratell): Now, as part as the presiding officer's instruction to you, he said that you would not be required to accept his version of the law. But would it be fair to say that because he's a lawyer and a former military judge for a significant period of time that it would have influence on you?

CM (Col XXXX): No more influence than yours or the prosecutor's. I mean, I can read, and so I will read it. If I don't understand it, I will ask enough people until I am sure I understand what it is.

DC (Mr. Dratell): Well, that raises another question, how do you foresee getting the assistance you need to make the independent analysis, that is your responsibility as a commissioner to decide whether it is the presiding officer's version, the defense's version or the prosecution's version or some combination of that, that that is going to be what your position is?

CM (Col XXXX): Well, I'm sure we'll be in here, and if I have a question, I'll ask.

DC (Mr. Dratell): Now, have you ever made legal determinations before of the type that we're anticipating in this case?

CM (Col XXXX): Of the type that we're anticipating in this case, no.

DC (Mr. Dratell): Are you comfortable or uncomfortable with that responsibility, not having necessarily the training or experience doing it?

CM (Col XXXX): I'm not uncomfortable with it.

DC (Mr. Dratell): But it's not the usual court-martial experience that you've had?

CM (Col XXXX): It's the same type of thing in the sense that you determine law. It's just different laws.

DC (Mr. Dratell): Now, I want to turn to something else that was brought up yesterday, just focussing on one part of it. You talked about brief things that you had received in the course of your duties with respect to al Qaida and other related issues and with respect to whether or not you remember them now, if something in evidence jolts your memory so that you do recall something in a briefing. Do you understand that you must disregard what you heard in that briefing?

CM (Col XXXX): Yes.

DC (Mr. Dratell): And will you -- how will you keep it from corroborating for you the credibility of a particular piece of evidence if it matches something that you heard in the briefing and that makes you recall it. How will you go about that?

CM (Col XXXX): Well, I understand the importance of the responsibilities that I have along with the other commission members. I understand that that's the requirements and I can make that distinction.

DC (Mr. Dratell): We talked also yesterday about your visit to the World Trade Center two weeks after September 11th 2001, and you were asked a question of how it made you feel -- and I don't have the transcript right in front of me -- but by my recollection is that your answer, said that you thought -- I think you were asked whether it made you angry, and you said that you thought it would make any American angry or any person angry, I don't remember the precise part of that answer; but you didn't answer really as to yourself, so I would just ask you again. If you could tell us how it made you feel, specifically?

CM (Col XXXX): It did not make my angry. Did you go there?

DC (Mr. Dratell): I actually live, yes --

PO: Colonel XXXX, please. It is the other way around.

DC (Mr. Dratell): I know very well. Believe me, I live there.

CM (Col XXXX): I would imagine it did not make me angry. It made me sad. It was a lot of destruction and loss of life.

DC (Mr. Dratell): Yes. And it was an intense scene, was it not, even two weeks after. It was still smoking?

CM (Col XXXX): Yes.

DC (Mr. Dratell): Debris?

CM (Col XXXX): Yes.

DC (Mr. Dratell): The facade, broken?

CM (Col XXXX): Yes.

DC (Mr. Dratell): How were you going to separate that experience and those feeling that you had, not necessarily anger, but the feelings that you did have from your consideration of the evidence in the case against Mr. Hicks?

CM (Col XXXX): It's separate things.

DC (Mr. Dratell): Can you just explain for us how you go about doing that. Because we -- you understand that we need to know and be confident that you can be a fair commissioner, separate those things out, and give Mr. Hicks the fair trial that he's due and that we understand that you understand is your responsibility.

CM (Col XXXX): I understand. I've read these charges. I understand that the fact that anybody's charged with anything doesn't apply more than that they're charged with it. And I make no connection in my mind between those charges and my visit to the World Trade Center.

DC (Mr. Dratell): Nothing further, thank you.

P (LtCol XXXX): Nothing, sir.

PO: Thank you, please return to the deliberation room and tell Colonel XXXX to come in.

Let the record reflect that Colonel XXXX has left the courtroom and Colonel XXXX has entered the courtroom. Please be seated. Let the record reflect that I'm handing Colonel XXXX his

questionnaire.

Trial?

P (LtCol XXXX): Nothing, sir.

PO: Defense?

ADC (Maj Mori): Good morning, sir.

CM (Col XXXX): Good morning.

ADC (Maj Mori): Sir, following up on yesterday's voir dire of you what legal, specific legal training have you had?

CM (Col XXXX): None.

ADC (Maj Mori): Have you -- do you have any relatives or close acquaintances that are attorneys?

CM (Col XXXX): No.

ADC (Maj Mori): How do you see this new opportunity to be involved in deciding issues of law and the criminal consequences?

CM (Col XXXX): What do I think about it, feel about it?

ADC (Maj Mori): Yes, sir.

CM (Col XXXX): Well, I've been ordered to it. I'm ordered to do it so it doesn't matter what I think or feel about it. I have been ordered to do it so I take it seriously.

ADC (Maj Mori): Yes, but that is a different type of challenge that you haven't had training for.

CM (Col XXXX): You're a Marine so you will understand my answer to that. In 25 years I've been forced into a lot of different circumstances that I had little training for. Specifically, this particular situation, but as training as an officer, I rose to

the occasion.

ADC (Maj Mori): Yes, sir. Now, you know Colonel Brownback is an experienced judge advocate from the Army. Do you feel that you may be looking to him to see what area he might be looking at on the law, or what his opinion on an issue might be?

CM (Col XXXX): If I don't understand the law as it is written it would be purely because there's a language I'm unfamiliar with and I would certainly ask him to explain that.

ADC (Maj Mori): Sir, if we're getting specifically into your billet with XXXX, just in general, in your questionnaire, Question 19 you mentioned that a reasonable person might think there was an appearance of impartiality. Was that just based solely on your role with XXXX, is that what you're dealing with, sir?

CM (Col XXXX): Yes.

ADC (Maj Mori): When did you first get involved and get tasked to deal with Operation Enduring Freedom?

CM (Col XXXX): On 9/11.

ADC (Maj Mori): On 9/11. And your main focus was to deal with the detainee operations or the whole war plan, sir?

CM (Col XXXX): In my billet as the XXXX at XXXX, in XXXX, I focussed on a broader plane --

DC (Maj Mori): Sir, I am going to ask -- if I get into areas that -- how did you know who the enemy was in Afghanistan?

CM (Col XXXX): You're really asking me a question that's down at the tactical level. I really didn't get involved in having to make that determination because that's not where I focused my energy.

ADC (Maj Mori): Was there any targeting regulations, or discussions, ROE type thing that helped identify who the enemy was that you are aware of?

CM (Col XXXX): Yes, ROE certainly helps you describe that. And I can't go into the detail with that in this session.

ADC (Maj Mori): Yes, sir.

CM (Col XXXX): Happy to in the closed session.

ADC (Maj Mori): Did you get reports back from -- obviously the conduct of operations in Afghanistan, did you get to read reports of engagements?

CM (Col XXXX): Sure.

ADC (Maj Mori): What was the general description of the type of reports you read?

CM (Col XXXX): You mean what was the content or what were the reports referring to?

ADC (Maj Mori): Yes, sir, what the reports referred to.

CM (Col XXXX): Well, there were situation reports as typical of what we were seeing from our components. There are different components: The air component, the land component, the naval component, and the Marine component. Beyond that, I won't discuss in this forum.

ADC (Maj Mori): Sir, is it fair focusing on the first --

AP (Maj XXXX): Colonel Brownback, could we ask Colonel XXXX to speak up. I believe the court reporter and counsel are having trouble hearing him.

PO: Please speak a little bit louder.

ADC (Maj Mori): Sir, focussing on the first three months of the conflict from October 7th, forward. First three

months that was mostly -- not too many bodies on the ground?

CM (Col XXXX): Correct. That's correct.

ADC (Maj Mori): Special forces.

CM (Col XXXX): That's common knowledge.

ADC (Maj Mori): Were you intimately involved on how those units were operating and where and what they were doing?

CM (Col XXXX): Not really. That was not -- the mission was given to the land competent commander and how he distributed those forces, and how he tasked those forces was up to him.

ADC (Maj Mori): Were you involved in planning or anticipating what type of resistance would be met by U.S. forces?

CM (Col XXXX): Say that again.

ADC (Maj Mori): Were you involved in anticipating what type of resistance the U.S. forces might meet?

CM (Col XXXX): Certainly.

ADC (Maj Mori): And do you recall what the basic sense of what resistance would be from the Taliban? I guess I could ask -- rephrase the question, sir?

CM (Col XXXX): Sure.

ADC (Maj Mori): At October 7th, prior to us actually starting with war, what was the sort of situation in Afghanistan that was going on between the Taliban and the northern alliance. Were you aware of that?

CM (Col XXXX): I was, but for me to recall that without going back to the records, I mean that would be difficult. I mean clearly there was contact

between the two. I don't recall how much or how little. For me to describe that in any sense of, you know, putting a metric against it would be difficult.

ADC (Maj Mori): Yes, sir. There was a sort of conflict going on between these two forces, the Taliban and the northern alliance?

CM (Col XXXX): Sure.

ADC (Maj Mori): And there were front lines, sir?

CM (Col XXXX): Some might describe them as front lines, and others would say it is not a linear battlefield.

ADC (Maj Mori): Yes, sir. In your opinion, did the Taliban have the right to resist attacks upon its country?

CM (Col XXXX): You're asking me to make a policy decision and that is not for me to make that decision.

ADC (Maj Mori): Just generally do you feel a country has the right to defend itself against attacks?

CM (Col XXXX): A sovereign country has a right to defend itself from an outside attack, yes.

ADC (Maj Mori): Sir, do you -- what is your understanding of what the Taliban, whether it was, or was not, the legitimate government of Afghanistan.

CM (Col XXXX): My understanding is that it was not recognized as a sovereign government. It did not really have a government -- a governing authority one would expect.

ADC (Maj Mori): Now, focussing on your involvement with the detainee operations, sir. Do you recall -- can you recall any names of individuals that you processed through?

CM (Col XXXX): No.

ADC (Maj Mori): Were you involved with John Walker Lyndh, sir?

CM (Col XXXX): Yes.

ADC (Maj Mori): And I obviously asked -- and seeing -- and --

CM (Col XXXX): You could name --

ADC (Maj Mori): But naming him.

CM (Col XXXX): You could name every person on any manifest and I would have to tell you that yes, I was involved in that. That I recognized their name from day in and day out; did I focus in on that name, day in and day out, no, I did not.

ADC (Maj Mori): At the very beginning, were you involved with the very first -- would you be, I guess, be put in the loop if someone was initially captured or how long would it take to get back to you, XXXX?

CM (Col XXXX): It depends on whether it was a single individual or a group of individuals and sometimes we'd get it instantaneously and other times it might take a week, sometimes even longer for that information to flow up just depending on where the individual was captured and the reporting cycle.

ADC (Maj Mori): And is that something that would have gone right here or to just XXXX and you?

CM (Col XXXX): It would have come through the XXXX, but it would have come through whatever component was responsible; and in our case for the most part, it was the responsibility of the land component commander.

ADC (Maj Mori): Yes, sir. So you do recall John Walker

CM (Col XXX): That's a common name so, yes, I recognize it. And I will tell you right up front, yes, I recognize David Hick's name. It's a common name. Ask me the other names that obviously I couldn't even pronounce if I wanted to, would I recall them, no.

ADC (Maj Mori): Do you recall anything else that was just generally about him that you got information from Australia?

CM (Col XXXX): Yes, I would have known that.

ADC (Maj Mori): Would you know who the U.S. forces were that captured him?

CM (Col XXXX): At the time I probably did know that. Right now, I could not recall.

ADC (Maj Mori): There would be records of that?

CM (Col XXXX): I suspect there is, yes, I am sure.

ADC (Maj Mori): Now did -- you mentioned yesterday about the operation of the Geneva Convention and the conflict in Afghanistan. Initially you said it applied or you saw some documents saying that it did apply, sir?

CM (Col XXXX): There was a lot of discussion on that as you could probably well imagine and it is centered principally around rules of engagement. And again, that is one of many, many conversations that I was privileged too, but was not in a position to make decisions towards Mr. Hicks.

ADC (Maj Mori): Yes, sir.

CM (Col XXXX): In the end, once the rules of engagement were blessed, then I was in a position to have to work in the confines of those rules of engagement.

ADC (Maj Mori): Yes, sir.

CM (Col XXXX): So specifically, the question about rules of engagement and the Geneva Convention -- you know, again, this is something that I would have to look back through and take a look at the records to find out how all that was discussed; but it is more of a policy issue not a military decision.

ADC (Maj Mori): And you mentioned policy and military. Do you think there's a distinction between a legal decision that you may have to make and a policy decision, sir?

CM (Col XXXX): Now you're talking about as my role on the commission?

ADC (Maj Mori): Yes, sir.

CM (Col XXXX): I don't make policy decisions and I don't make law decisions. I have to -- I am going to be faced with looking at the law and applying to this particular unique situation.

ADC (Maj Mori): And there's a difference with somebody that has the motivation, people who make policy decisions is different then what your job is here?

CM (Col XXXX): Absolutely.

ADC (Maj Mori): Is there more for me to cover in the Geneva Convention I will reiterate in a different session, classified session?

CM (Col XXXX): I don't think so. But I'll leave that up to you to make that determination, so.

ADC (Maj Mori): Yes, sir. What was your knowledge of the northern alliance and the U.S.'s interaction with them during the conflict I guess?

CM (Col XXXX): I would prefer to do that in the closed session.

ADC (Maj Mori): What was your knowledge of the Taliban before September 11th, sir?

CM (Col XXXX): None.

ADC (Maj Mori): What was your knowledge of al Qaida before September 11th?

CM (Col XXXX): None. With exception of obviously the general stuff. I mean -- I did not focus in on it.

ADC (Maj Mori): You had some basically in War College?

CM (Col XXXX): Yeah, exactly.

ADC (Maj Mori): If loss of life occurred in Afghanistan when it did for U.S. forces, was that something that was reported to you as well, sir?

CM (Col XXXX): Yes.

ADC (Maj Mori): Do you recall when the first hostile casualty occurred?

CM (Col XXXX): Specifically the date?

ADC (Maj Mori): Just generally, sir.

CM (Col XXXX): No, I don't know. No, I couldn't tell you when it occurred. I really can't.

ADC (Maj Mori): Did you interact at all with any coalition forces besides the north alliance, any other countries forces?

CM (Col XXXX): Yes, well -- did I interact with them? We were coalition headquarters so I interacted with the coalition headquarters. Those that were in the coalition headquarters so -- in my role. But as far as those that were on the ground, did I interact with them, no. And that is because once again they reported through a land component commander.

ADC (Maj Mori): Yes, sir. But, were you aware on operational order of plans on when coalition forces would be on the ground, when they were on the ground in Afghanistan?

CM (Col XXXX): Yes.

ADC (Maj Mori): Do you -- is that something you can answer here, sir?

CM (Col XXXX): No.

ADC (Maj Mori): Sir, you mentioned you had limited knowledge of Islam from briefings. Briefings in Central Command, sir?

CM (Col XXXX): No. Really it had to do with -- through my War College experience prior to going to XXXX and then what limited discussion of it while at XXXX; but I mean nothing in excruciating detail.

ADC (Maj Mori): Sir, obviously being around XXXX and a combatant commander, policy decisions would impact that combatant commander's decision?

CM (Col XXXX): Certainly.

ADC (Maj Mori): And in policy decisions that come down involve some politics. Would you agree with that, sir?

CM (Col XXXX): I am sure that there were policies that are established that had politics involved. Does every single policy have politics involved? Your guess is as good as mine.

ADC (Maj Mori): Yes, sir. But here the decisions you have to make as a member, between policy and political impact has nothing to do with it?

CM (Col XXXX): That is correct.

ADC (Maj Mori): And I'd like to go back to the knowledge of

the Taliban. If the defense were to offer evidence either through written documents or expert testimony that the Taliban in fact was the legitimate government under international standards. Is that something that you would be open to consider?

CM (Col XXXX): Absolutely.

ADC (Maj Mori): Thank you, sir. I have no further questions.

PO: Trial?

P (LtCol XXXX): Thank you, sir. Sir, your involvement with the accused being on manifest -- just to make sure, we're clear. Your involvement with that was essentially made a manifest that was forwarded. Is that correct, sir, or was it further than that?

CM (Col XXXX): Nothing further.

P (LtCol XXXX): And did you receive any further specific information about the accused prior to being involved with this commission proceeding?

CM (Col XXXX): No.

P (LtCol XXXX): Any knowledge that you may have acquired while at XXXX either about the Taliban or otherwise would you be able to set that aside and consider the evidence that is presented by both sides in this proceeding?

CM (Col XXXX): Yes.

P (LtCol XXXX): Nothing further, sir.

PO: Defense?

ADC (Maj Mori): No, sir.

PO: Thank you. You may return to the deliberation room. Please send Colonel XXXX in.

Let the record reflect that Colonel XXXX has entered the courtroom.

Trial?

P (LtCol XXXX): None, sir.

PO: Defense?

ADC (Maj Mori): Yes, sir. Good afternoon, sir. Sir, following up on yesterday's voir dire.

PO: I apologize, I handed Colonel XXXX the copy of his questionnaire.

ADC (Maj Mori): Sir, you were actually deployed to Operation Enduring Freedom; is that correct?

CM (Col XXXX): That is not correct. Just some individuals from my unit who were.

ADC (Maj Mori): And did any of those airmen ever get injured or killed in action in Afghanistan?

CM (Col XXXX): No.

ADC (Maj Mori): I'm assuming to go farther into the issue without the required authorization, do we need to go into closed session; is that correct?

CM (Col XXXX): We can do that if you like, but I can tell you right here I was not involved with any of the operational tactical level details of those operations. So what I tell you in closed session is what I am going to tell you here. I don't know very much.

ADC (Maj Mori): Obviously, that is your unit so it had a big impact in the war.

CM (Col XXXX): That is your opinion. What I would say is that I provided forces to another government agency and that other government agency may or may not, in

your opinion, have had a big influence in that war.

ADC (Maj Mori): Had a big impact on killing Taliban and al Qaida members?

CM (Col XXXX): I don't know that for a fact, sir.

ADC (Maj Mori): Your evaluation, sir, are you aware of that?

CM (Col XXXX): I'm aware of what I wrote.

ADC (Maj Mori): I have a fitness report of officer service performance report 22 May 2001 to 21 May 2002, sir. I can provide you so you can --

CM (Col XXXX): I'm well aware of what my fitness report says.

ADC (Maj Mori): Yes, sir. And so it talked about fantastic results tracking and killing Taliban.

CM (Col XXXX): Yes. If you'll notice that I did not write that. That was written and signed by my superiors and what I'm telling you is I have no specific knowledge of any individual that was or was not killed by my organization.

ADC (Maj Mori): Did you ever get -- you got daily briefings on the -- at all?

CM (Col XXXX): I did not get daily briefings. I got briefings probably once a week on merely the status of my people in term of administratively how they were doing, when they were going to rotate back. And I also need to let you know when I say my people that also included civilian contractors who were under contract to me to perform certain duties.

ADC (Maj Mori): That's fine, sir. Okay, sir. Now did -- what is the EC-130 info war system?

CM (Col XXXX): An EC-130 is a compass call airplane. It

is a modified C-130 that is in a general sense used to pick up electronic signals.

ADC (Maj Mori): And --

CM (Col XXXX): And to jam.

ADC (Maj Mori): And to jam. And that was to -- that was utilized in the conflict in Afghanistan, sir?

CM (Col XXXX): I believe it was. My role there, to get to the point here, was I was the force sustainer for those airplanes. Meaning that when those airplanes rotated back and came in from the field, from operational units, I made sure that they were maintained properly. If there was depot level maintenance, which means taking wings off and engines off, we did that. If there was any new equipment that needed to be put on those airplanes, those airplanes would be flown and given to me and my team would put that equipment on the airplane, test it, and then give it back to what we common refer to as the warfighters.

ADC (Maj Mori): Did you ever talk with any of your, the individuals that worked with you, when they returned about what they did?

CM (Col XXXX): Which individuals would you be talking about, sir?

ADC (Maj Mori): Dealing with the Predator, sir.

CM (Col XXXX): Dealing with the Predator? I did have discussions with them about some of their operations with none of the tactical details; things such as how long were you gone, did they take good care of you, always make sure that we got all your paperwork in for getting proper pay, administrative type details. It was only at one point in time that I was ever given information about the details of any operations, we can't talk about that here and what I can tell you is all I was told was where some of my folks were going to

be.

ADC (Maj Mori): Okay, sir.

CM (Col XXXX): And that was it.

ADC (Maj Mori): Did some of your people -- were they part of XXXX?

CM (Col XXXX): They were not, as far as I know. That term is not familiar with me.

ADC (Maj Mori): In Question Number 41 on your questionnaire, sir, you mentioned again, standing tall with the threat of terrorism. Can you explain to me again what that means to you, sir?

CM (Col XXXX): What I intended to say there -- and I apologize to the court for not expanding on it so that we could avoid some of these questions -- is that much like many of the threats that have faced this country throughout its history the American people have found a way to sacrifice and do what it needed to do to endure. I would hope that the American people would do the same in this case and I'm proud to be part of the Department of Defense and the Air Force during this time when our country needs us to do that.

ADC (Maj Mori): Thank you, sir. And part of that standing tall would be to maintain our values?

CM (Col XXXX): Absolutely.

ADC (Maj Mori): And a fair trial is one of our inherent values in this country?

CM (Col XXXX): Absolutely.

ADC (Maj Mori): Sir, I know that we talked a little bit before I asked you about the legal making -- legal decisions and being involved with multiple commissions, I would like to ask you some more of the following. But you've had no legal training;

is correct, sir?

CM (Col XXXX): None.

ADC (Maj Mori): And --

CM (Col XXXX): None other than the annual briefings that we get on the laws, on the conflict and those kinds of things.

ADC (Maj Mori): Yes, sir. Have you been a member in a court-martial before?

CM (Col XXXX): I have not.

ADC (Maj Mori): Have you been a convening authority for a court-martial?

CM (Col XXXX): I have not although I have been a commander with UCMJ authority. I have never had to do that.

ADC (Maj Mori): Do you have any close friends or any relatives that are attorneys?

CM (Col XXXX): No.

ADC (Maj Mori): And you don't think it will be a challenge to deal with legal issues in the commissions?

CM (Col XXXX): I believe that there will be legal issues that will have to be discussed and understood, but I also understand my role on this commission is to both judge the law and the facts. Which means that if I had a question about the law, I would look to various resources including the defense counsel, prosecution, and Colonel Brownback to help me answer those questions. If I don't get a sufficient answer on that, then I will seek help through the court in other ways. I am not going to be shy about asking those kinds of questions because I am not a lawyer.

ADC (Maj Mori): Yes, sir. And you're not concerned being

involved with four different commissions that are going on? Well not on the same day, but are occurring in sequence that you might confuse issues of law or issues of fact?

CM (Col XXXX): Major, I can honestly tell you I don't think that is going to be a problem.

ADC (Maj Mori): You don't think it would be an issue if you decide an issue of law in one commission that that decision in that commission won't flow over into your decision in another commission?

CM (Col XXXX): If the evidence presented in one case brings into a question of law in that case and that same question of law may or may not pertain to the next case, and that evidence has not been presented, then I'll ask the question in that second case.

ADC (Maj Mori): So you would rely on your knowledge from other cases --

CM (Col XXXX): I wouldn't say that --

ADC (Maj Mori): -- on how you would operate in the next commission?

PO: Okay. Thank you for being argumentative. Come on, move on.

ADC (Maj Mori): Okay. Yes, sir.

PO: No. Thank you, Colonel XXXX.

ADC (Maj Mori): I understand, sir, but -- sir, you are expressing concern in the questionnaire about concern to your families due to publicity. As you were instructed earlier today, that release of your names was not the fault of the defense or the prosecution.

CM (Col XXXX): I understand that.

ADC (Maj Mori): You lost a professional acquaintance in the World Trade Center?

CM (Col XXXX): Yes, Colonel XXXX.

ADC (Maj Mori): And do you think that will impact you at all on your ability to sit in this commission?

CM (Col XXXX): While that was a very sad incident and while my heart goes out to his family, I can tell you that my duty here is to be fair and objective.

ADC (Maj Mori): It's the noon tone, sir, they are testing the base.

CM (Col XXXX): My duty here is to be fair and objective and I will carry out that duty.

ADC (Maj Mori): Thank you, sir. One minute, sir. Sir, no further questions, thank you.

PO: Trial?

P (LtCol XXXX): None, sir.

PO: Thank you, Colonel XXXX, please leave the courtroom.

CM (Col XXXX): So I can send in the next person?

PO: Okay. Trial and defense, it is a -- according to Major Mori you just heard the noon tone, which I haven't heard since I've been here. The gally closes at 1300 which is where most people are going to eat. I would rather continue on, but I recognize that you all want to eat. We'll continue with individual voir dire at 1310, giving everyone a full hour to eat. Any problem with that, trial?

P (LtCol XXXX): No, sir.

PO: Defense?

DC (Mr. Dratell): No, sir.

PO: Court is in recess.

The Commissions Hearing recessed at 1201, 25 August 2004.

*The Commission Hearing was called to order at 1312,
25 August 2004.*

PO: The Commission is called to order. All parties present when we recessed are once again present. The presiding officer and Lieutenant Colonel XXXX are present.

I'm passing to Lieutenant Colonel XXXX his questionnaire for his use if we need it during this.

Trial, voir dire?

P (LtCol XXXX): None, sir.

PO: Defense, voir dire?

ADC (Maj Mori): Yes, sir. Good afternoon, sir.

CM (LtCol XXXX): Good afternoon.

ADC (Maj Mori): Sir, I'd like to ask you some questions directly dealing with your participation in Operation Enduring Freedom.

CM (LtCol XXXX): I understand.

ADC (Maj Mori): Can you -- when did you first get notified that you would be going over to Afghanistan?

CM (LtCol XXXX): My notification -- this is going to be a ballpark figure -- probably middle of October 01.

ADC (Maj Mori): After or before the bombing campaign had started in Afghanistan, do you recall?

CM (LtCol XXXX): I believe it was after.

ADC (Maj Mori): And now, you were working directly -- you were at Fort Bragg; is that right?

CM (LtCol XXXX): This is correct.

ADC (Maj Mori): So you were working directly with the special forces units from Fort Bragg; is that correct?

CM (LtCol XXXX): Yes.

ADC (Maj Mori): Are you part of that -- are you part of the special forces unit there?

CM (LtCol XXXX): I am not special forces, no.

ADC (Maj Mori): Okay. But were you directly attached to them?

CM (LtCol XXXX): I was not attached to a special forces unit. I was attached to a XXXX.

ADC (Maj Mori): Okay. And which ultimately became XXXX is that correct, sir?

CM (LtCol XXXX): Yes. XXXX stood up various task forces over in the gulf, and I was attached to one of them.

ADC (Maj Mori): And that was under General XXXX, XXXX?

CM (LtCol XXXX): If we're going to go further than that we'll need to go into closed session.

ADC (Maj Mori): Okay. Can you tell me where on the ground you were located in Afghanistan?

CM (LtCol XXXX): I'd like to discuss that in closed session.

ADC (Maj Mori): Okay. Same if I asked the question when you were there?

CM (LtCol XXXX): Yes, I'm sorry -- well, I can give you the ballpark when I was deployed. That was roughly XXXX through roughly XXXX, and that's give or take a week or two.

ADC (Maj Mori): Yes, sir. And what was your role in Afghanistan?

CM (LtCol XXXX): I was an intelligence operations and plans officer.

ADC (Maj Mori): Can you explain to me what --

CM (LtCol XXXX): Closed session. I apologize, but we'll have to go into closed session.

ADC (Maj Mori): Okay. Were you involved with -- can I -- were you involved with obtaining information that had come from captured personnel?

CM (LtCol XXXX): We're going to have to go into closed session, I'm sorry.

ADC (Maj Mori): Okay, sir. You've have no legal training; is that correct?

CM (LtCol XXXX): That's correct.

ADC (Maj Mori): Ever sat as a court-martial member?

CM (LtCol XXXX): No, I have not.

ADC (Maj Mori): Civilian jury duty ever?

CM (LtCol XXXX): Never been called.

ADC (Maj Mori): Okay. Any close friends that are attorneys or relatives that are attorneys?

CM (LtCol XXXX): No.

PO: You've noticed the common response to all the members about friends who are attorneys? It's sort of scary, isn't it?

CM (LtCol XXXX): I was implying nothing, sir.

ADC (Maj Mori): Yet you are now in a role where you have to actually make legal decisions and determinations?

CM (LtCol XXXX): Yes.

ADC (Maj Mori): And you're familiar that typically would be done, at least in the American judicial system, either military or civilian, by an independent judge?

CM (LtCol XXXX): Yes.

ADC (Maj Mori): Do you have any hesitations about filling the role of the judge without legal experience?

CM (LtCol XXXX): No, I do not.

ADC (Maj Mori): Can you explain why not, sir?

CM (LtCol XXXX): Why not? Because the commission is based upon the documents that have been provided to us. That is our role. That has been determined by authorities higher than myself. I believe that I am perfectly competent as a military officer and professional to carry out those duties.

ADC (Maj Mori): Now, you mentioned in your questionnaire that you're slightly concerned about your family might get contacted because of the notoriety and you're aware that neither the defense nor the prosecution were responsible for your name being released in the media?

CM (LtCol XXXX): Yes, I understand.

ADC (Maj Mori): Now, you describe in your questionnaire kind of a self-study on al Qaida, Taliban, and Islamic fundamentalism?

CM (LtCol XXXX): Yes.

ADC (Maj Mori): Can you -- I guess, in a nutshell, dealing with al Qaida, what is your understanding of who that is?

CM (LtCol XXXX): That is the -- you mean specifically what is al Qaida as I understand it?

ADC (Maj Mori): Yes, sir.

CM (LtCol XXXX): It is an organization set up under Usama bin Laden, Islamic fundamentalists, and that is my understanding of al Qaida.

ADC (Maj Mori): And prior to 9/11, did you have any knowledge of al Qaida, sir?

CM (LtCol XXXX): Very general.

ADC (Maj Mori): Very general? And what do you believe to be the goal of al Qaida?

CM (LtCol XXXX): Honestly, I do not have a good answer for that.

ADC (Maj Mori): The Taliban, when did you first start learning anything about the Taliban? Prior to 9/11 or after 9/11?

CM (LtCol XXXX): I do not recall hearing about the Taliban other than in extremely general terms prior to 9/11. I knew that the northern alliance and the Taliban were at war, and that's about the extent of my knowledge.

ADC (Maj Mori): Sir, do you feel that the Taliban had the right to be defending its country from an attack?

CM (LtCol XXXX): Defending its country against an attack? Well, I think that was the whole reason for contest, is whose country was it.

ADC (Maj Mori): But would you agree with the principle that whether it's a good government or a bad government, that government in power has the right to try -- an

inherent right to try and keep itself in power?

CM (LtCol XXXX): The government in general, yes, I would.

ADC (Maj Mori): What is your, again, your understanding of Islamic fundamentalism as you described? What do you -- how do you distinguish that from just other Islam?

CM (LtCol XXXX): That's a good question. Islamic fundamentalism, as I understand it, is very focussed on Islam, specifically to the, I guess, the deletion of other followings, other faiths.

ADC (Maj Mori): Is that an area of knowledge that you would be open to hearing evidence on to help educate you in the area of Islam or Islamic fundamentalism?

CM (LtCol XXXX): Certainly.

ADC (Maj Mori): Sir, in Question 41, you talked about September 11th, driving home, the idea that freedom isn't free, and that our military is vital to defend it; is that correct?

CM (LtCol XXXX): That is correct.

ADC (Maj Mori): Do you think that the military is also vital for them to defend our core values as Americans?

CM (LtCol XXXX): Yes, I do.

ADC (Maj Mori): And would you agree that one of those values is fairness and equality?

CM (LtCol XXXX): Yes.

ADC (Maj Mori): Kind of going back to the questions I asked you about the legal experience and filling this new role as a finder of law or a decider of law, as an intel officer you obviously are the person in the know in the unit you're working with because of your role as an intel officer and your experience;

correct, sir?

CM (LtCol XXXX): Yes, that is correct.

ADC (Maj Mori): And you might have senior people in rank to you looking to you for information and advice because of your job and your experience?

CM (LtCol XXXX): That's correct.

ADC (Maj Mori): Is it fair to say that during this commission process that you may, as well, look towards Colonel Brownback for his experience in his legal background and knowledge to help you in dealing with issues in this commission?

CM (LtCol XXXX): In understanding legal terminology and things like that, yes, I do.

ADC (Maj Mori): Do you think if he expressed an opinion on a legal issue in the deliberation room, do you think that might impact on your decisions that you make on the issues?

CM (LtCol XXXX): I believe it would carry as much weight as any other member of the panel based upon the rules that have been set before us.

ADC (Maj Mori): And so, sir, you recognize that there could be a sort of appearance that he might have influence over other members but for the rules that say he shouldn't.

PO: What does that have to do with Colonel XXXX?

ADC (Maj Mori): I'm just asking on his perception, sir. It's the last question on this area. I'm moving on.

CM (LtCol XXXX): I'm sorry. Could you restate that?

ADC (Maj Mori): You're basing that you won't let it influence you based on the rule, but the influence would still be there. But you would have to try to

remember, okay, the rule says I can't let their influence impact me; is that what you're saying, sir?

CM (LtCol XXXX): It would not be a matter of having -- or trying to remember. I would remember.

ADC (Maj Mori): Yes, sir. Do you -- during any of your units that you participated with in Afghanistan, or individuals you met, was there any loss of life, U.S. casualties?

CM (LtCol XXXX): Yes, there was loss of life.

ADC (Maj Mori): Do you remember when the first hostile U.S. casualty occurred?

CM (LtCol XXXX): No, I do not.

ADC (Maj Mori): Did it occur while you were in country or after you departed, sir; do you recall?

CM (LtCol XXXX): Well, I'm pretty confident it happened before I ever got in country.

ADC (Maj Mori): As an intel officer, you have to collect information and determine whether it's reliable or not; correct, sir?

CM (LtCol XXXX): That's correct.

ADC (Maj Mori): How do you think your experience as an intelligence officer will impact your ability here to determine the credibility of either what witnesses may say, or documentary evidence, or any type of intelligence that you might receive during this commission process?

CM (LtCol XXXX): I'm not sure as an intelligence officer that's necessarily a correct statement; but certainly all the information is going to have to be weighed against the rest of the information, and you base your decision upon that.

ADC (Maj Mori): And you're aware that the standard that applies here to find David Hicks guilty of any charge is beyond a reasonable doubt. Do you understand that, sir?

CM (LtCol XXXX): I do understand that.

ADC (Maj Mori): And is that a standard higher than what you may use as an intelligence officer to put into one of your intelligence reports to confirm the information? I guess, if you received information from -- during your role as an intelligence officer, what standard do you use to screen it to determine whether you would pass it on as valuable intelligence?

CM (LtCol XXXX): Ideally, you're going to have multiple sources of information to corroborate or not. I don't know if that answers your question.

ADC (Maj Mori): No, that does, sir. So would you say that beyond a reasonable doubt proof would be higher than that?

PO: Would you like to propose an instruction for him on beyond a reasonable doubt, Major Mori? I mean, that's a matter of law. Do you want to tell him what you think it is and ask him if he understands that?

ADC (Maj Mori): Well, sir, I'm just trying to explore his performance of his intelligence duties where he is making credibility calls.

PO: Well, then you may do that, but don't use a legal term to do that.

ADC (Maj Mori): Yes, sir. Multiple sources is something you would require before giving intelligence or determining if it's credible?

CM (LtCol XXXX): I would not say it's required, certainly not. But that's -- the more information you have, the better.

ADC (Maj Mori): And would it also be important to hear how far removed the person is from the source that provides it to you? The person that you got the information from, did they actually observe the event versus someone who heard it from someone else?

CM (LtCol XXXX): Certainly.

ADC (Maj Mori): Now, during your time in Operation Desert Storm, did you have any interaction with prisoners there?

CM (LtCol XXXX): No, I did not.

ADC (Maj Mori): What was your knowledge of the northern alliance?

CM (LtCol XXXX): Very general based upon news reports or reports from documentary-type things.

ADC (Maj Mori): And did you interact with any northern alliance forces in Afghanistan?

CM (LtCol XXXX): No, I did not.

ADC (Maj Mori): Did some of the service members you work with interact with northern alliance forces?

CM (LtCol XXXX): Yes, they did.

ADC (Maj Mori): Did you interact with any coalition partners outside the northern alliance forces, service members from other countries?

CM (LtCol XXXX): We'll need to discuss that in closed session.

ADC (Maj Mori): Have you ever heard of the name Saif al Adel?

CM (LtCol XXXX): I don't believe I have.

ADC (Maj Mori): Ibn Sheikh al Libi?

CM (LtCol XXXX) No, I have not.

ADC (Maj Mori): Muhammad Atf, also known as Abu Hafs al Masri?

CM (LtCol XXXX): No, I have not.

ADC (Maj Mori): During your time in Afghanistan, did you ever hear David Hicks' name?

CM (LtCol XXXX): I did hear his name in the media.

ADC (Maj Mori): Did you -- anything from the course of your actual operations that you were conducting?

CM (LtCol XXXX): No.

ADC (Maj Mori): Did you ever hear any information about an Australian who had been captured through your --

CM (LtCol XXXX): No.

ADC (Maj Mori): Did you, again, during your actual operations there, did you learn about John Walker Lyndh at all?

CM (LtCol XXXX): Again, only through the media.

ADC (Maj Mori): Only through the media. Sir, one moment, please.

The assistant defense counsel conferred with his co-counsel.

ADC (Maj Mori): Sir, what did you learn from the media about David Hicks?

CM (LtCol XXXX): I just recall that an Australian had been captured, and that's really about the extent of it, just one more little tidbit of information.

ADC (Maj Mori): Did you form any opinion or have any thoughts when you heard that?

CM (LtCol XXXX): No, I was too busy.

ADC (Maj Mori): Did anyone else ever talk to you about what was going on there and who they were capturing -- the U.S. was capturing?

CM (LtCol XXXX): I'm not sure I understand.

ADC (Maj Mori): In relation to David Hicks, other people that you captured, not in your operational aspects of it, but just in the social?

CM (LtCol XXXX): No.

ADC (Maj Mori): You -- someone answered, sir, before you, had answered that the order tells you that it's this way, and so you're going to abide by the order. And all of us as military officers have a sort of instinct to follow the order. Do you feel that you would consider either the lawfulness of orders or whether those orders provide what would be required for a fair trial?

CM (LtCol XXXX): Yes.

ADC (Maj Mori): And if those orders didn't provide our standard of justice, you would be able to say that that order is improper, even if was issued by the Secretary of Defense?

CM (LtCol XXXX): Would I understand or would I be able to comment whether or not the order was lawful? Is that the question?

ADC (Maj Mori): Not just lawful in the typical sense that you would say, Marine do this, Marine do this; but in the sense that an order written that creates a justice system, and you as a decider of law, would you be able to decide whether or not that system met certain standards that are required outside of the Department of Defense.

PO: Are you going try to provide a brief to educate him

on what you think on this?

ADC (Maj Mori): Yes, I --

PO: Would you like to wait until he gets that brief?

CM (LtCol XXXX): I believe I would because I'm not sure I'm tracking where he's going.

ADC (Maj Mori): Are you open to information and arguments that might ask you to say the Department of Defense was wrong?

CM (LtCol XXXX): Certainly.

ADC (Maj Mori): And if you saw the evidence and the legal arguments and agree with them, you wouldn't hesitate to find that it was wrong.

CM (LtCol XXXX): No.

ADC (Maj Mori): As an intelligence officer, do you have any opinion what techniques can be utilized on an individual to gain information from them?

CM (LtCol XXXX): No, I do not.

ADC (Maj Mori): Have you received any training in that area?

CM (LtCol XXXX): No, I have not.

ADC (Maj Mori): You don't deal with the collection of human intel?

CM (LtCol XXXX): No, I don't.

ADC (Maj Mori): Do you work with or have been associated with others that that was part of their job?

CM (LtCol XXXX): I've been associated with them, yes.

ADC (Maj Mori): Have they ever discussed with you what type of techniques they may use too?

CM (LtCol XXXX): No, they have not.

ADC (Maj Mori): Do you think that the techniques employed on a person to gain information would be important to know to weigh the credibility of that information obtained?

CM (LtCol XXXX): Yes, I do.

ADC (Maj Mori): Sir, I have no more questions.

PO: Trial?

P (LtCol XXXX): None, sir.

PO: Thank you. You may return to the deliberation room. Please tell Colonel XXXX to come in.

Let the record reflect that Colonel XXXX has left the courtroom and that Colonel XXXX has entered it.

I just provided Colonel XXXX his copy of the questionnaire.

Trial?

P (LtCol XXXX): None, sir.

PO: Defense?

DC (Mr. Dratell): Yes, sir, thank you. Good afternoon, Colonel XXXX. Lieutenant Colonel XXXX?

CM (LtCol XXXX): Yes. Good afternoon, sir.

DC (Mr. Dratell): I want to take you back yesterday just to explore a little further some of the answers from yesterday. And the first is, with respect to what you've conceded were strong emotions about September 11th, that you would take your emotion out of it, with respect to your duties with the commission. And I just want to know how you intend

to do that?

CM (LtCol XXXX): Sir, the way I intend to do that is to look at the case objectively and try to put my emotions aside, which I will.

DC (Mr. Dratell): But without knowing what the evidence is in advance and without knowing what the legal issues that you're going to decide -- without knowing them now in advance, how can you assure us that something will not rekindle this emotion and interfere with your ability to be objective?

CM (LtCol XXXX): I can only give you my word, sir.

DC (Mr. Dratell): Well, you want to do your duty in this case; correct?

CM (LtCol XXXX): That is correct, sir.

DC (Mr. Dratell): And you don't want to refuse an assignment that you consider an important one in the context of not only -- not necessarily your career, what you consider in the context of the military.

CM (LtCol XXXX): That is correct, sir.

DC (Mr. Dratell): So you're trying to overcome this emotional issue that you have by trying to stay objective?

CM (LtCol XXXX): That is a correct statement, sir.

DC (Mr. Dratell): But you've never been in this position before, I take it?

CM (LtCol XXXX): No, not at this level, sir.

DC (Mr. Dratell): And that has to do not only with facts, but also with respect to making legal decisions?

CM (LtCol XXXX): I've made legal decisions under UCMJ only, sir.

DC (Mr. Dratell): But not as a judge.

CM (LtCol XXXX): Never as a judge, sir.

DC (Mr. Dratell): And are you familiar with what are called mixed questions of law and fact that involve a particular application of a legal principle to a set of facts that may be different from one case to another case and how the law is applied?

CM (LtCol XXXX): No, I cannot say I'm an expert at that, sir.

DC (Mr. Dratell): Well, what we're concerned obviously with is the ability to get an objective panel that can give Mr. Hicks a fair trial. And as you sit here now in advance, I just -- I'm concerned about how you can assure us that your emotions will not intrude. And I'll just give you an example, and it may have something -- even if it has to do with Mr. Hicks, I think we agree that it would be inappropriate to let the emotions get in the way; correct?

CM (LtCol XXXX): Yes, emotions will not get in the way, sir.

DC (Mr. Dratell): But even things that have nothing to do with Mr. Hicks may raise emotions with you that would interfere with your ability to do the job which you can't even anticipate now because you're not in the situation. I want to just give you an example. The charge sheet, looking at the charge sheet, it talks about the history of al Qaida; and it talks about that al Qaida was formed in 1989, a time when Mr. Hicks was 13 years old. Yet something in the presentation of evidence with respect to that could trigger an emotional response for you. And I just want to know how you can assure us that that's not going to interfere when you say you have these strong emotions?

CM (LtCol XXXX): Sir, I'm a very passionate person, and I

believe in justice. It's probably one of my moral absolutes, that I believe in justice; and everyone should receive a fair trial. That's one of the foundations of my life and I believe justice under the law should be served both ways for Mr. Hicks and yourself. And that is my -- probably, my strongest belief, one of my core values that I like to identify myself with, sir.

DC (Mr. Dratell): You understand with respect to the charge sheet that I just read from, that as a matter of evidence, this has no value whatsoever?

CM (LtCol XXXX): I understand, sir. It's just a charge sheet.

DC (Mr. Dratell): And with respect to the President's determination that Mr. Hicks is eligible to be charged as a matter of what's in that determination as a matter of fact also is to be given no weight by you?

CM (LtCol XXXX): I understand that, sir.

DC (Mr. Dratell): Now, you'll be hearing multiple cases, and we want to be sure about whether or not you feel comfortable with deciding different issues and different cases, seeing witnesses perhaps in one case, seeing the same witness in other cases, and being able to judge that witness or that issue solely on what is before you with respect to that particular person. And I want to get your thoughts on that process, if you've ever had it before, if it makes you feel comfortable, uncomfortable, confident, how you feel about that?

CM (LtCol XXXX): I'm very comfortable that I can compartmentalize those issues, sir. One case being one case, another case being another case. Based on the duties that I've performed in the past -- I'm a deputy brigade commander for an aviation unit, multiple issues over multiple times and multiple things that I have to do; and I do them fairly well, sir. So I think I can do the same in

this setting and commission.

DC (Mr. Dratell): It's not just multitasking. Understand what you're going to be facing. It's not just multitasking. It's taking almost the same information or the same types of issues with respect to one person, and then eliminating that from your deliberation with respect to another person with almost, maybe the same facts, maybe the same witness, maybe the same legal issue. Different facts, different persons, so it's not the same as being able to handle more than one task at a time.

CM (LtCol XXXX): Understood, sir.

DC (Mr. Dratell): And do you have experience with that in the context of what we're talking about?

CM (LtCol XXXX): In a legal setting, no, sir.

DC (Mr. Dratell): If the presiding officer might provide Lieutenant Colonel XXXX the MCO Number 1, please.

The presiding officer handed MCO-1 to Lieutenant Colonel XXXX.

DC (Mr. Dratell): If you could look at section 6(D)(1) -- and unfortunately, the copy that I have is not numbered, there are no page numbers -- but it's about half-way through the document; and toward the bottom, it's a section marked "admissibility." And if you could just read that to yourself, and then I'll just ask you a couple of questions, please.

The member did as instructed.

CM (LtCol XXXX): Okay, sir.

DC (Mr. Dratell): Now, do you understand that that gives you the authority to call for a vote of the entire commission if you disagree with a decision of the presiding officer with respect to the admissibility of any piece of evidence?

CM (LtCol XXXX): Yes, I do understand that, sir.

DC (Mr. Dratell): Are you prepared to exercise that authority?

CM (LtCol XXXX): Yes, sir, I am prepared to execute my duty.

DC (Mr. Dratell): And are you prepared to exercise it in an affirmative way and not necessarily look for an alliance, look for somebody else to do it first?

CM (LtCol XXXX): No, sir, I'll come forward as an individual.

DC (Mr. Dratell): Now, with respect to the presiding officer's instruction earlier, in which he also noted that we object to, which is that the presiding officer will, at times, provide advice on the law to the other commission members. And the question is how are you going to keep that from having more influence being who the presiding officer is and his background, and the influence that counsel such as myself, or any of the other defense counsel or the prosecution, and how are you going to make that determination on an independent basis. So if you could explain to us, if you can?

CM (LtCol XXXX): It is a very difficult orchestry (sic), yes, it is. I will take the facts as you present them, apply them to what is written in front of me as to the law with my interpretation, how you will present it as a counsel, also as the defense and if there's further questions, I will ask Colonel Brownback for any further clarifications, what I hope to do from the defense and also yourselves is helping me with that information as I read the law.

DC (Mr. Dratell): And are you comfortable or uncomfortable with that position for the first time, I assume, in your career?

CM (LtCol XXXX): I'm comfortable, sir.

DC (Mr. Dratell): But this is the first time in your career you'll be doing that?

CM (LtCol XXXX): Yes, sir.

DC (Mr. Dratell): Now, when you said yesterday, and in your questionnaire, that you were concerned about reprisals from al Qaida, in particular, I think was mentioned; but with respect to your role in the commission process -- and I want to ask you if that's not an assumption -- isn't that an assumption that someone like Mr. Hicks has something to do with al Qaida? Isn't that just prejudging him as to his connection or with respect to some of the issues in the case?

CM (LtCol XXXX): I wouldn't say that, sir. I would just say -- when I said "reprisals," I was trying to give an example of what I would be saying. I don't know who would give me reprisals. It's a feeling, sir.

DC (Mr. Dratell): Also in your questionnaire, as was discussed yesterday, at some point you expressed an opinion to someone in some forum that all of the detainees at Guantanamo were terrorists. And I'm curious what the basis was for that opinion.

CM (LtCol XXXX): What it asked was had I ever stated that opinion prior. I'm trying to be totally honest within the questionnaire. When the Guantanamo situation was going on a long time ago and, yes, in the past I probably said that. I wanted to be totally honest. Yes, I have been in conversations because I come from XXXX. A lot of soldiers, we've been in Afghanistan, not myself personally. And those conversation have come up, yeah, there was a lot of terrorists taken, and they were taken to Guantanamo Bay. And I've been in those discussions, sir, and that was the context of what it was, nothing specific.

DC (Mr. Dratell): But I'm just curious what the basis was.

How did you form that opinion? What information did you have to form that opinion?

CM (LtCol XXXX): I actually took the opinion from the conversations themselves. They were defined as terrorists in the conversations, and I used the same term, sir.

DC (Mr. Dratell): And when you say it was just general, I mean you understand that you can't generalize in this process?

CM (LtCol XXXX): Yes, sir, I understand that.

DC (Mr. Dratell): And you express it as an opinion that you expressed as one time, and I'm getting the sense that it's not your opinion now.

CM (LtCol XXXX): In retrospect, no.

DC (Mr. Dratell): And what changed your mind?

CM (LtCol XXXX): It's a fair term to use, sir. Because there's no one -- there's been no due process that's been done here, and that's not a fair statement to say.

DC (Mr. Dratell): And you mentioned due process yesterday. So it leads -- actually, it's my next question, which is: How would you define "due process"?

CM (LtCol XXXX): I see it as justice, I guess, what you would say is justice in and under the law in a setting of some sort, such as a courtroom.

DC (Mr. Dratell): And in the context of that definition, does it meet your definition of due process if the prosecution puts on a witness who reads a statement that was made to that witness, but not the person who made the statement --

P (LtCol XXXX): Sir, I'm going to object.

PO: Go on.

DC (Mr. Dratell): -- and the defense does not have an opportunity to cross-examine the person who actually said it, the conditions under which it was made or any potential motive for the statement, but only the person, for example a law enforcement agent would come in?

PO: Before you answer the question, let's listen to Colonel XXXX's objection.

P (LtCol XXXX): Well, sir, not only was that kind of a long question, but it asks for a lot of speculation, if this happens, if that happens. We don't feel that that's tailored to find out whether this witness possesses any kind of bias. So it's an argumentative question and it's based on speculation.

PO: Well, I know, but I let Major Mori argue. I might as well let Mr. Dratell argue. Presume as a fact that someone sits on the stand and reads you a statement. The statement is made by a third -- by another party. The other party is not here in the courtroom and will never be here in the courtroom. The person who's reading it said and you ask him, what do you know about that and the making of it and the taking of it, and he says, I don't know nothing.

I believe the question is in two parts. First of all, would you be willing to listen to arguments that that statement should not be given much weight because you don't know how it was made, how it was taken or whatever? That's the first part.

CM (LtCol XXXX): And the answer to that is, yes, sir.

PO: Okay. The second part was your individual opinion, and if you don't feel comfortable rendering it until you've been educated in the law by the defense and the trial -- they'll certainly understand that -- do you think that's fair, using the term as Mr. Dratell has used it as "fair" and

if you want to wait until they educate you, you can wait.

CM (LtCol XXXX): I'd like to know more about it, sir, before I answer that question.

DC (Mr. Dratell): Well, I'll add another element. If the defense wanted to call the person that made the statement, we couldn't because he was either -- we couldn't have access to him because he was being detained here or had already been released to another country and we couldn't bring him back, so all we have was a piece of paper, and we couldn't cross-examine a piece of paper. Does that meet your definition of due process?

PO: If that were to occur, would you once again listen to arguments as to how that should affect the weight?

CM (LtCol XXXX): Yes, I would listen to all arguments.

DC (Mr. Dratell): So may I ask the alternate question, which is --

PO: Sure, go on.

DC (Mr. Dratell): -- does that meet your definition of due process as you've defined it for us?

CM (LtCol XXXX): At the time of the example you've given me, I'd have to at that time make my decision on argument.

DC (Mr. Dratell): And would that be the same answer with respect to questions of whether or not certain evidence should come in because of the way it was obtained? In other words, an interrogation technique or questions about the applicability of the Geneva Convention, are you saying that you would want to wait to see more about that as to whether that meets your definition of due process?

CM (LtCol XXXX): Yes, sir.

DC (Mr. Dratell): I have nothing further. Thank you.

PO: Trial?

P (LtCol XXXX): Sir, would you agree to keep an open mind and just consider each piece evidence as it comes in, as it is presented to you?

CM (LtCol XXXX): Yes, I would.

P (LtCol XXXX): Do you understand the questions of counsel at this point about what might happen are speculative and not necessarily an indication of what may or may not occur in this trial?

CM (LtCol XXXX): I understand, sir.

P (LtCol XXXX): Thank you.

PO: Mr. Dratell?

DC (Mr. Dratell): Nothing. Thank you, Lieutenant Colonel.

PO: Please toss me your questionnaire and leave the courtroom.

CM (LtCol XXXX): Yes, sir.

PO: Let the record reflect that Colonel XXXX has left the courtroom.

Who do you want back for closed, trial?

P (LtCol XXXX): Sir, we're not asking for anybody on closed.

PO: Okay.

DC (Mr. Dratell): We would like Colonel XXXX, please, Colonel XXXX, and Colonel XXXX, please.

PO: How long is it going take you to clear the courtroom, trial?

P (LtCol XXXX): Ten minutes, sir?

PO: I don't know, I'm asking.

P (LtCol XXXX): I'm not sure either, sir. Ten minutes would suffice.

PO: Okay. We'll meet -- what we're going to do is -- what's the matter, Major Mori?

ADC (Maj Mori): Nothing, sir.

PO: Okay. We're going to meet at 1400. We'll hear those, and we'll hear the challenges in the closed session, then we'll open up. If counsel ask lots of questions, we won't open up for a while. If they don't ask lots of questions, we'll open up sooner. I can't say when we'll open.

Court's in recess.

The Commission Hearing recessed at 1351, 25 August 2004.

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

in the case of

United States v. DAVID MATTHEW HICKS

a/k/a Abu Muslim al Austraili
a/k/a Muhammaed Dawood

This is to certify that Pages _____ through _____ are an accurate and verbatim transcript of the foregoing proceedings.

Peter E. Brownback III
Colonel, U.S. Army
Presiding Officer

Date

THE NEXT SESSION WAS A CLOSED SESSION AND SEALED WITH A CLASSIFICATION OF **S E C R E T**. THIS SESSION CONSISTS OF PAGES 79 TO 104 AND CONTAINS THE INDIVIDUAL VOIR DIRE OF COMMISSION MEMBERS: COLONEL XXXX, COLONEL XXXX AND LIEUTENANT COLONEL XXXX.

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

in the case of

United States v. DAVID MATTHEW HICKS

a/k/a Abu Muslim al Austraili
a/k/a Muhammaed Dawood

This is to certify that Pages _____ through _____ are an accurate and verbatim transcript of the foregoing proceedings.

Peter E. Brownback III
Colonel, U.S. Army
Presiding Officer

Date

*The Commissions Hearing was called to order at 1514,
25 August 2004.*

PO: This commission will come to order. Let the record reflect that all parties present when the commission recessed are once again present. I am the only member present.

During the closed session defense you made two challenges, I'm going to paraphrase them. They are on the record but this is just so people sitting here will know. The first challenge was a challenge for cause against Colonel XXXX. You feel that his knowledge of the operations in Afghanistan, specifically the knowledge of the transportation of the detainees is such that he would be better suited to be a witness than to be a member, and further that his links with personnel in theater were such that he could be characterized as a victim. Is that correct, generally?

DC (Mr. Dratell): Yes.

PO: Second, you challenged Lieutenant Colonel XXXX for cause first because of his activities in the Afghanistan AOR during the time period in question and his knowledge of various activities and locations that may come up later in the trial, and additionally because he was on the ground and the locations he was in were such that he could well have been a victim if the allegations were to be believed. Is that a fair characterization?

DC (Mr. Dratell): Yes, it is.

PO: Okay.

DC (Mr. Dratell): And also we adopted the objections yesterday the challenges yesterday from Mr. Hamdan's attorney.

PO: Okay. Those are the closed challenges. Based on

the open sessions you got any challenges, trial?

P (LtCol XXXX): No, sir.

PO: Defense?

DC (Mr. Dratell): Yes, sir, and if I may just put on the record in the open session so we don't have to resort to a classified session -- just to brief to put in the open session our objection to holding proceedings without Mr. Hicks present, which we will brief in a motion with respect to any evidentiary matters, but we also object to it in the voir dire process. And our challenges, first just to restate the challenges made by Mr. Hamdan's attorney yesterday. In addition, we believe that two of the commissioners are in a position --

PO: Hold on a second. Let's just start with XXXX. Do you challenge him?

DC (Mr. Dratell): Yes.

PO: Why do you challenge Colonel XXXX?

DC (Mr. Dratell): Same reason as Mr. Hamdan based on the September 11th visit, the emotions that raised, and the ability to segregate that from the issues in the case.

PO: Okay, that's XXXX; right? You already have a closed challenge. You have an open challenge against him?

DC (Mr. Dratell): Yes, sir. Essentially that even from his open session his knowledge of the specific facts is too much knowledge of the specific facts for him to be a -- essentially a juror, he is more suitable as a witness. And also just his involvement suggests bias and I would analogize it to a situation here where you have a -- someone who was in charge of prisoner movement for the Bureau of Prisons and was involved in transporting defendants from one to another according to certain criteria and according

to certain standards and did that, then you are asking that person to be a jury for a specific person whom he remembers, and he said that in open session.

PO: Okay. That is XXXX. XXXX?

DC (Mr. Dratell): Not with respect to XXXX. Not with respect to Colonel XXXX.

PO: No challenge to XXXX?

DC (Mr. Dratell): Colonel XXXX --

PO: Just a second. XXXX?

DC (Mr. Dratell): Again with respect to his -- too much knowledge.

PO: Practically the same thing as the closed challenge?

DC (Mr. Dratell): That is correct.

PO: Okay.

DC (Mr. Dratell): On both grounds and also -- I should say also with Colonel XXXX, with the victim part and the context of the command structure, we would add as an open -- based on the open record as well.

PO: Okay.

DC (Mr. Dratell): And with respect to Colonel XXXX, his involvement in the theater and in the operations it is like having someone who is assigned to a task force to investigate a situation and he doesn't personally arrest or target a particular defendant, but we worked on the whole investigation, and now you are asking him to come in and sit on a jury to determine whether that person is guilty or not guilty.

PO: That's XXXX, and now we get XXXX. You have a challenge on him?

DC (Mr. Dratell): Yes. With Lieutenant Colonel XXXX is the same as yesterday essentially with respect to the motions and I think that this is a situation that he and -- and I appreciate his honesty, and I appreciate his effort, and his notable desire to do his duty, but I just do not believe that he is correctly anticipating what is going to be required of him in terms of the emotional aspect of it. And I don't believe that he can give an adequate assurance based on his lack of experience in so many of these areas, in making so many of these determinations that he cannot adequately give an assurance that he can avoid letting that emotion intrude upon his duty in this commission.

PO: Okay. Trial?

DC (Mr. Dratell): I also have -- I just have one other -- I have another challenge as to -- well, I grouped them differently, but I enumerate the particular commissioners. With respect to XXXX -- Colonel XXXX and Colonel XXXX specifically that what we are asking them to do at this stage is to essentially override things that they did for either months or years in the context of what they were doing. Colonel XXXX specifically said this morning in open session about once the question of the Geneva Convention applying even though it wasn't his decision once that had been blessed he carried it out. And what we are asking now to a certain extent is that it was all wrong, and he was wrong, and his superiors were wrong, and we are asking him to do something that you can ask a juror to do legitimately.

The same with are Colonel XXXX with respect to same types of issues, ROEs, things like that. I just don't see how you could put them in the position of having to sort of -- it is a referendum on their conduct and the conduct of their chain of command during a period of time when they were actively involved in this, and I think it is just too close for it to be objective.

And we have two challenges that go to all -- that go to the entire panel. One, is that the panel should be disqualified because of lack of legal training. We think it creates --

PO: I am not going to accept that challenge. You may brief it. Okay. That is not a challenge. No. I not am going to listen. Move on.

DC (Mr. Dratell): You said you wanted us to brief it; we will brief it. I think that we can make it part of the context of how we brief the question of the presiding officer providing legal advice to the non-lawyers to the other non-lawyers.

PO: Great. Put it in.

DC (Mr. Dratell): We will include it in that context. Another across the board challenge is we believe that no panel of commissioners should hear more than one case, and we think that by having them here and making determinations runs which trial first, second or third. The motions will be proceeding simultaneously and we think that it is inappropriate given the experience, and given what is involved in questions of law and questions of fact, mixed questions of law and fact, that they should not be required, and we think that it is inappropriate, and will be unfair, and beyond the scope of their capability. Without any disparagement to them, I think it is beyond the scope of anyone's capability to be a juror in two cases like this.

PO: Okay. Brief that.

DC (Mr. Dratell): Okay.

PO: No, I mean that's the motion on the structure. Once again that has nothing to do with the challenge to the jurors. It just doesn't. Go on.

P (LtCol XXXX): Yes, sir. Sir, the attacks of

September 11th 2001 had a huge impact on the United States military. To try to find a panel that is not impacted by those attacks of September 11th is just not the appropriate standard. It affects many, many people in the United States military. The standard should come back to what it is. Whether there is good cause to believe that the member cannot perform fairly and impartially in according a full and fair trial. All of these members have demonstrated very clearly that what we have is a very experienced, a very knowledgeable and very fair panel, that they can be independent; and we believe that none of the challenges for cause should be granted.

As to Colonel XXXX, who visited the world trade center site once, on questioning about it, he does not equate that to this trial. He will consider the accused's guilt or innocence based on the evidence that is put before him. He does not feel any anger towards the accused because of those events. He does not equate the two.

Colonel XXXX served in XXXX as a senior military officer. And in picking the best military officers there are, the best and the brightest, you find some that do have jobs that put them in positions to know about operations and who have been involved in operations. That does not disqualify him or any of these members. The fact is that he does not know the accused. He was not in the same area where the accused was when his alleged activities were taking place. In fact, the only extent to which he knows him, quote, unquote, would be that his name was on list of people who were being moved; and simply his role was logistical. He does not answer to ROEs or the success or failure of operations that were going on. He was the logistics person who was seeing a manifest as it moved on. That does not disqualify him.

Sir, the same we would say for Lieutenant Colonel XXXX, that he was not in the direct area of the

accused. He does not know the accused. The fact that he knows generally about operations in Afghanistan would put him in a category with a lot of military officers. Sir, Lieutenant Colonel XXXX, we believe as he answered the questions demonstrates that the emotions he has are natural emotions to an attack such as September 11th; but that he is a professional and that he can set those aside and be fair. Thank you, sir.

Mr. Dratell, you want to say anything?

DC (Mr. Dratell): Just that with respect to -- I think that -- it is inconceivable to me that the United States military cannot find a panel of five that does not include two persons so intimately involved that that's what the prosecution is suggesting. I think that it is inconceivable that there can't be two others who are not so intimately involved in the specific facts and intelligence officers with that kind of specialized knowledge to sit on this case and be objective and fair. I think it would be impartial or fair otherwise; and with respect to Colonel XXXX, obviously, as I noted before, we adopted the record from yesterday. And sir, you have already referred that to the appointing authority based on that record so --

PO: No, no. I have -- yesterday, I said I would refer the challenges made in the case of Hamdan. Today we incorporated -- whatever -- and we go back, whatever I told Gunny to put in the record. You then said you wanted to adopt Commander Swift's challenge against Colonel XXXX. I didn't say you adopted it, you did.

DC (Mr. Dratell): No, no -- yes.

PO: Okay.

DC (Mr. Dratell): I know what I am saying, but I think if you refer to yesterday there is no basis not to refer it today. It is the same situation.

PO: Okay. Well, I am going to refer it.

DC (Mr. Dratell): Okay. I am just answering the argument of the prosecution.

PO: Thank you. Okay. Major Mori, how many things I told you to brief now -- well, no, I mean we started off and you got to brief the standard that the appointing authority should use; right?

ADC (Maj Mori): Yes, sir.

PO: And then you are going to brief whether there should be a lawyer on the panel at all; right?

ADC (Maj Mori): Yes, sir.

PO: And then you are going to brief the two motions that -- well, the two challenges that Mr. Dratell made; right? Remember those last two?

ADC (Maj Mori): Yes, sir.

PO: And that is all part of the stuff that's going to go up to the appointing authority because all those things are things you want considered; right?

ADC (Maj Mori): Yes, sir.

PO: And do you remember what the dates are for those.

ADC (Maj Mori): Those are --

PO: Have you forgotten?

ADC (Maj Mori): No, sir. Those are 1 October --

PO: No, no. This is 7 September for the motions. You give them to the trial or the prosecution. The prosecution will respond to you and send them up to Mr. Altenburg. The reason is because if he is going to make -- you are challenging the structure of the selection process; and he is going to need your informed views on those things.

DC (Mr. Dratell): I have no problem with that. I just think that because we have multiplied the responsibilities here and some of us are going to be getting back to our offices at certain times by the end of the week, I just ask for a day or two more since we have added to --

PO: Well, that's why I gave you -- I mean, no. I was going to write down the week from today, but I didn't. I wrote down two weeks from today.

DC (Mr. Dratell): Okay.

ADC (Maj Mori): Sir, if we could leave off the structural challenges because that would probably be an issue we could deal with the actual members?

PO: So you are going to dump the thing that there is -- which ones are you going --

ADC (Maj Mori): We would save that to brief along with our regular motions when we attack the whole structure of the commission.

PO: That's fine. You all understood what they are going to be providing by the 7th?

P (LtCol XXXX): Yes, sir.

PO: Good.

Okay. I considered the challenges. Like I told you before I am going to forward a transcript of voir dire, the transcript of yesterday's voir dire, the challenge procedure, the members questionnaire, my information, all up to Mr. Altenburg for his action. I hope to get all that stuff to him by the 10th so you all can get action moving. Under the provisions of the MCI I am not going to hold the proceeding in abeyance. Please call the members.

Please be seated.

The commission will come to order. Let the record reflect all parties present when the commission recessed are once again present. The members are present.

Members, you received both by e-mail and by my handing it to you, or someone else handing you, certain written instructions concerning administrative matters which are now being marked as the next RE in sequence, 14.

Objections to those preliminary instructions, defense?

DC (Mr. Dratell): No, sir.

P (LtCol XXXX): No, sir.

PO: Okay. Members, I have been appointed as the presiding officer. On Monday you got all the commission orders, the directives, the instructions, except for MCI Number 8. Those instructions and references apply to all the cases in which you may be a commission member. I am charged with certain duties. I preside over the commission proceeding during open and closed sessions. As the only lawyer appointed to the commission, I will instruct you on the law.

However, the President has decided that the commission will decide all questions of law and fact. You are not bound to accept the laws as given to you by me. You can accept the law as argued to you by counsel, whether by briefs, or in motions, or attachments. It is also given to you by me in instructions. If you have questions on the law when we are sitting in the commission hearing, you may ask counsel questions about whatever it is they are arguing.

We are not going to discuss the cases with anyone including ourselves, including recesses or adjournments. When we are meeting in closed

conference, then we will discuss it. We will only consider evidence properly admitted before the commission. You are not going to consider any other accounts or anything you may have learned in a past life.

You may not discuss the proceedings of this commission with anyone who is not a member of the panel. If anyone attempts to do it, tell them to stop, notify me; and I will make sure appropriate action is taken. When we are closed to deliberate, we alone will be present. Each of us has an equal voice and vote in deciding and discussing all issues submitted to us. As presiding officer, I will preside over the closed conference deliberations and I will speak for the commission in announcing results.

Outside influence from superiors in the governmental chain will not be tolerated. If anyone tries to influence you in any way, notify me immediately and appropriate action will be taken. No one in your chain, or in any other chain, can reprimand you or do anything to you for your actions on this commission. Some of you may serve as members, or alternate member, on more than one case. If you do so, each case is separate. You have got to keep the facts and the law of each case separate. We are giving you binders to keep the notes in different cases, mark the notes. You all also have a security arrangement around the courtroom, around the building rather, within the building, and in the courtroom. The operational commander made those decisions. We are required to follow those decisions because he owns the building. You may not infer or conclude from the security arrangements that the accused is guilty of any offense or that he is dangerous. Security arrangements are not part of evidence.

Colonel XXXX, you have been designated an alternate member; and you will become a member if there is a vacancy that needs to be filled. You will attend all open sessions, but you will not be

present for closed conferences or deliberations and you may not vote on any matter. You will attend all opened and closed sessions -- excuse me, but you will not be present for any closed conferences or deliberations. You may not vote on any matter unless you become a member.

Members, you are not authorized to reveal your vote or the factors that led to your vote or reveal the vote or comments of another member when it comes to deliberation on findings or, if necessary, on sentence. This is a lawful order from me to you. You may only reveal such matters if required to do so by a superior competent authority in the military commission process or by a U.S. federal court. This order is continuing and does not expire.

It is important that you all keep up your appearance and demeanor. If you have got a problem, you need a break, let me know and we will take care of it. All members understand those instructions? Apparently so.

Counsel for both sides understand the provisions of the MCO Number 1 concerning protected information?

DC (Mr. Dratell): Sir, if I may? I was confused before about the particular place where we were in the instruction. It is not a surprise, I don't think, to the presiding officer but we did have an objection to one sentence that is going to be subject of our brief to that particular instruction about the advice --

PO: Well, make it.

DC (Mr. Dratell): -- well, about the advice -- about the advice -- giving advice to the commission.

PO: You already made the objection.

DC (Mr. Dratell): No, I understand; but since you are giving the instruction again, I just wanted to make

sure that it was clear.

PO: Okay. You all remember this morning I advised you that they had made an objection and that they are going to file a brief; right? Okay, there.

DC (Mr. Dratell): Thank you.

PO: Yes, that's fine. I just thought I covered it this morning.

Okay. Counsel for both sides understand the provisions of MCO-1 covering protected information. Trial?

P (LtCol XXXX): Yes, sir.

PO: Defense?

DC (Mr. Dratell): Yes, sir.

PO: As soon as practical, notify me of any intent to offer evidence involving protective information so we may need to close the courtroom; right?

P (LtCol XXXX): Yes, sir.

DC (Mr. Dratell): Yes, sir.

PO: Right. Okay, right now is there any issue relating to the protection of witnesses that we got to take up?

P (LtCol XXXX): No, sir.

DC (Mr. Dratell): No, sir.

PO: If there are any protective order issues or things like that, we will solve them before the counsel in this case leave the island, won't we?

P (LtCol XXXX): Yes, sir.

DC (Mr. Dratell): Yes, sir.

PO: Good. I will be on a plane; you all will be here. We will solve them.

Okay. I am required by MCO-1 to consider the safety of witnesses and others of these proceedings. Both counsel, you got a duty to notify me if you got any issues about witness safety.

Both last night and this morning, counsel for both sides and I met and we had a couple conferences in which we discussed various matters that are going to go on today. We are going to go into them today, right now; and I am going to cover what I thought was important. If I don't cover something that you all think is important, tell me.

Major Mori, do you have any notice of motions you would like to advise the panel on?

ADC (Maj Mori): Yes, sir, I do.

PO: Okay. Well then, speak slowly please.

ADC (Maj Mori): Yes, sir. The defense would give notice of motions jurisdictional style and motions to dismiss for lack of jurisdiction and that the appointing authority is not authorized to appoint or convene a military commission and the military commission lacks jurisdiction to convene at Guantanamo Bay.

PO: Okay.

ADC (Maj Mori): That the lack of jurisdiction, that the President's military order creating this military commission is invalid.

PO: Okay.

ADC (Maj Mori): Lack of jurisdiction because the charges against Mr. Hicks are not law of war violations or other crimes triable by a military commission.

PO: Okay.

ADC (Maj Mori): Lack of jurisdiction because the commission fails to provide the required protections for an accused's individual in a criminal trial under international law.

PO: Because of the commission process?

ADC (Maj Mori): Commission process, that is correct, yes, sir. Not the commission members, but the commission process.

PO: Okay.

ADC (Maj Mori): The motion to dismiss lacks jurisdiction because the commission violates equal protection under the U.S. Constitution and international law and that it applies -- the commission process only applies to non-U.S. citizens.

PO: Okay.

ADC (Maj Mori): The commission lacks jurisdiction because the commission is not an independent tribunal. It is not a structural challenge, sir. The motion to dismiss all charges as they fail to state an offense. Lack of jurisdiction over conduct occurring before the beginning of the armed conflict into -- in Afghanistan as the commission would only have jurisdiction when an armed conflict in violation of the laws of war.

PO: Okay.

ADC (Maj Mori): That the commission lacks personal jurisdiction over Mr. Hicks, an Australian citizen, who resided outside of the U.S. and whose conduct has no nexus to the U.S. Motion to dismiss for lack of speedy trial. Motion to dismiss for imposition of pretrial punishment. Motion to dismiss for lack of jurisdiction because Mr. Hicks is entitled to the presumption, status and prisoner of war and must be tried for any crime he may have

committed in a system equal to a court-martial. Motion to dismiss for unlawful command influence. Motion addressing the presiding officer's role in providing legal advice to the other members and the role of an attorney on the commission. Motion to dismiss for improper referral of the charges as members below the pay grade of O-4 are systematically excluded from the selection process to serve on the commission. A motion for a bill of particulars. We also would ask, sir, that the ability to amend or add any motion or withdraw any motion prior to the due date set by the commission, sir, for motions.

PO: Okay. Are you going to give a copy -- just a written copy of that to the trial and us?

ADC (Maj Mori): Yes, sir, I can.

PO: I would appreciate that.

Okay. On your motion for a bill of particulars, with that motion alone, you are going to provide the motion to trial by the 15th of September. Trial is going to give you a response by the 29th of September and you are going to file your reply, if any, by the 6th of October; right?

ADC (Maj Mori): Yes, sir.

PO: Okay.

ADC (Maj Mori): We can meet those deadlines, sir.

PO: It's what you agreed to yesterday.

ADC (Maj Mori): That's fine, that's fine.

PO: Okay. On the other motions you named, two of them specifically are going to go up now on the times I gave you earlier because it is going to get to Mr. Altenburg so he can do the challenges; right?

ADC (Maj Mori): Okay.

PO: So we got rid of the BoP and we got rid of the challenge questions. On the other motions, you are going to provide motions by the 1st of October. Trial, respond by the 15th of October and defense will then reply if necessary by the 22nd of October; right?

ADC (Maj Mori): Yes, sir.

PO: Okay. Defense, you made a motion for a continuance in which you requested that the court hold proceedings in abeyance pending various diplomatic discussions between the United States and Great Britain which might have an affect upon your client. Without going any further, did you make that motion?

ADC (Maj Mori): Yes, sir. The defense did and provided it to the --

PO: Did you make the motion?

ADC (Maj Mori): Yes, sir.

PO: Thank you. However, you are willing to -- despite that, you are willing to proceed on the stuff we have already talked about as long as we don't get into the actual trial on the merits; right?

ADC (Maj Mori): Yes, sir.

PO: With that caveat, do you feel compelled to argue about a motion for continuance at this time?

P (LtCol XXXX): No, sir.

PO: Thank you, I appreciate that. In that case we won't rule until necessary on the motion for continuance. In connection with -- what?

ADC (Maj Mori): Sir, I was just going to say that motion -- that request for continuance has been provided to the court reporter and should be marked as the next

review exhibit, sir.

PO: Do you have your response up there?

P (LtCol XXXX): We do have a response, sir.

PO: Okay. Well, give them to the court reporter and we can mark them both as the next two.

Review Exhibits 15 and 16 were marked for the record.

P (LtCol XXXX): Yes, sir.

PO: In connection with these motions that are going to be addressed to the commission, not the ones -- the briefs that are going to Mr. Altenburg by the -- how about the 1st of October? The commission would like you to, both sides to file briefs with the commission on the issue of do all these motions have to be certified to Mr. Altenburg? To the appointing authority? Just on the jurisdictional ones and specifically on the provision of MCO-1 Section 4(A)(5)(D), do all interlocutory questions that could or really could terminate the proceedings have to be certified or just ones in which our ruling is about to terminate proceedings?

Got any questions on that, trial?

P (LtCol XXXX): None.

PO: Defense?

ADC (Maj Mori): None from the defense, sir.

PO: Okay. Either side got any objections to the POMs?

P (LtCol XXXX): No, sir.

DC (Mr. Dratell): Not at this time. We will submit those in writing if we have them, sir.

PO: By when?

DC (Mr. Dratell): This 1 October.

PO: I would like to use them to get the motion practice and the things done. We are not talking about a motion to -- I want an objection -- 15 September?

DC (Mr. Dratell): 15 September is great.

PO: Through motions and discussions, I have learned that there are concerns about the communications with the office of the appointing authority. Does either counsel or either side object if the presiding officer requests interpretations of the MCO or the MCIs in the appointing authority's area of interest directly by e-mail from the presiding officer to the appointing authority after notice to counsel and providing counsel with the opportunity to brief the issue?

P (LtCol XXXX): No, sir.

DC (Mr. Dratell): No, sir.

PO: We set last night -- well, we agreed last night on a trial date in this case of the 10th of January; correct, trial?

P (LtCol XXXX): Yes, sir.

PO: Before I go, do you want a chance to stand up and argue that I should sooner?

P (LtCol XXXX): Sir, we have discussed it.

PO: Well, no. No, we are right here. Do you want to argue? You can argue.

P (LtCol XXXX): We don't need to argue, sir.

PO: Okay, 10th of January; right?

DC (Mr. Dratell): Correct, sir.

PO: Okay. Recognizing that we have your motion of

continuance and we will have other things coming on and things that may happen.

Now, we got a lot of motions here. So we set a motions hearing for the 2nd of November right here; right?

DC (Mr. Dratell): Correct, sir.

ADC (Maj Mori): Yes, sir.

PO: Major Mori had that thousand yard stare. I was making sure he was looking at me. Okay, 2nd of November here for motions hearing. Did I forget to cover anything?

AP (Maj XXXX): No, sir.

DC (Mr. Dratell): Nothing that I can see, Your Honor.

PO: Accused and counsel, please rise.

Mr. David Hicks, I now ask you how do you plead?

ACC: Sir,

To all the charges, not guilty.

PO: Thank you, please be seated. Nothing further from either side. This court is in recess and are to meet on the 2nd of November or on call.

The Commission Hearing recessed at 1549, 25 August 2004.

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

in the case of

United States v. DAVID MATTHEW HICKS

a/k/a Abu Muslim al Austraili

a/k/a Muhammaed Dawood

This is to certify that Pages _____ through _____ are an accurate and verbatim transcript of the foregoing proceedings.

Peter E. Brownback III
Colonel, U.S. Army
Presiding Officer

Date

No. 040001

UNITED STATES

v.

DAVID MATTHEW HICKS
a/k/a Abu Muslim al Austraili
a/k/a Muhammed Dawood

Military Commission Members

JUN 25 2004

The following officers are appointed to serve as a Military Commission for the purpose trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member of the Military Commission will serve until relieved by proper authority.

In the event of incapacity, resignation, or removal of a member who has not been designated as the Presiding Officer, the alternate member is automatically appointed as a member.

Colonel Peter E. Brownback, III, USA (Retired), Presiding Officer

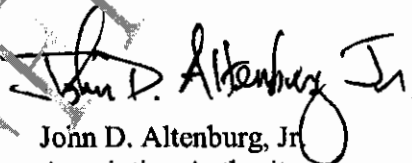
Colonel [REDACTED] USMC, Member

Colonel [REDACTED] USMC, Member

Colonel [REDACTED] USAF, Member

Lieutenant Colonel [REDACTED], USAF, Member

Lieutenant Colonel [REDACTED] USA, Alternate Member



John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Review Exhibit 1

Page 1 Of 1

ENCL 1

~~SECRET~~
THE WHITE HOUSE
WASHINGTON

OFFICE OF THE
SECRETARY OF DEFENSE

2003 JUL 14 PM 5:12

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources, including the factual summary from the Department of Defense Criminal Investigation Task Force dated June 24, 2003 and forwarded to me by the Deputy Secretary of Defense by letter dated July 1, 2003:

Pursuant to the Military Order of November 13, 2001 on "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism";

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the Armed Forces of the United States, hereby DETERMINE for the United States of America that in relation to David Matthew Hicks, Department of Defense Internment Serial No. US9AS-000002DP, who is not a United States citizen,

- (1) There is reason to believe that he, at the relevant times:
- (a) is or was a member of the organization known as al Qaeda;
 - (b) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
 - (c) has knowingly harbored one or more individuals described in subparagraphs (a) or (b) above.
- (2) It is in the interest of the United States that he be subject to the Military Order of November 13, 2001.

Accordingly, it is hereby ordered that, effective this day, David Matthew Hicks shall be subject to the Military Order of November 13, 2001.

DATE: *July 3, 2003*

White House Office-controlled Document

DECLASSIFIED IAW
JTF-GTMO-J2 SCB, 10 JUN 2004
DECLASSIFIED ON: 23 AUG 2004
Review Exhibit *2*

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Page 1 Of 1

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DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

July 28, 2004

MEMORANDUM FOR COMMANDER [REDACTED] USN
LIEUTENANT COLONEL [REDACTED] USMC
LIEUTENANT COLONEL [REDACTED] USMC
MAJOR [REDACTED] USA
CAPTAIN [REDACTED] USA
LIEUTENANT [REDACTED] USNR
CAPTAIN [REDACTED] USAFR

SUBJECT: Detailed Prosecutors

Consistent with my authority as Chief Prosecutor and the provisions of Sections 4B(2) of Military Commission Order No. 1, dated March 21, 2002, and Section 3P(2) of Military Commission Instruction No. 3, dated April 30, 2003, the above named counsel are detailed and designated as follows:

United States v. al Bahlul

Detailed Prosecutor: Commander [REDACTED]

Detailed Assistant Prosecutors: Lieutenant Colonel [REDACTED], Captain [REDACTED]

United States v. al Qosi

Detailed Prosecutor: Lieutenant Colonel [REDACTED]

Detailed Assistant Prosecutors: Lieutenant [REDACTED] Captain [REDACTED]

United States v. Hamdan

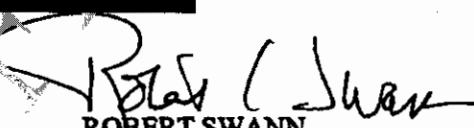
Detailed Prosecutor: Commander [REDACTED]

Detailed Assistant Prosecutors: Captain [REDACTED]

United States v. Hicks

Detailed Prosecutor: Lieutenant Colonel [REDACTED]

Detailed Assistant Prosecutors: Major [REDACTED]


ROBERT SWANN
Colonel, U.S. Army
Chief Prosecutor
Office of Military Commissions

cc:
Deputy Chief Prosecutor
Mr. [REDACTED]

Review Exhibit 3

Page 1 Of 1





DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

August 13, 2004

From: Colonel Will A. Gunn, Chief Defense Counsel

To: Mr. David Hicks

Subj: REQUEST FOR SELECTED DETAILED DEFENSE COUNSEL

1. Your request dated 5 August 2004 to have LtCol [REDACTED] serve as your Selected Detailed Defense Counsel is denied. I have determined that LtCol [REDACTED] is not available.
2. In accordance with paragraph 3E of Military Commission Instruction Number 4, I consulted with LtCol [REDACTED] Judge Advocate General, Rear Admiral Michael F. Lohr. Admiral Lohr has determined that LtCol [REDACTED] is not available due to his assigned duties and responsibilities as Director of the Navy-Marine Corps Appellate Government Division.
3. Please notify me if you have other requests.

Will A. Gunn, Colonel, USAF
Chief Defense Counsel
Office of Military Commissions

Copy to:

Mr. Joshua L. Dratel

Major Michael D. Mori

Major Jeffrey D. Lippert

MSgt [REDACTED]

Review Exhibit

4

Page

1

Of

2

05 August 2004

From: David Hicks, Detainee, Naval Base Guantanamo Bay
To: Col Gunn, Chief Defense Counsel, Office of Military Commissions

Subj: REQUEST FOR SELECTED DETAILED DEFENSE COUNSEL

1. I am currently facing charges before a military commission. I am aware I have the ability to ask for a Selected Detailed Defense Counsel under Military Commission Order No. 1.
2. I request LtCol [REDACTED], USMC, be detailed to represent me as my Selected Detailed Defense Counsel.
3. LtCol [REDACTED] is currently serving as [REDACTED] Office of the Judge Advocate General of the Navy. I am aware that in his current billet he represents [REDACTED]. Knowing this, I still request he be detailed.
4. I request that Major Michael D. Mori, my Detailed Defense Counsel be permitted to continue his representation of me as authorized under Military Commission Order No. 1. I understand that Maj Lippert, USA, will be assigned to my defense team on 09 August 2004. I understand that if this request is granted, Maj Lippert may be removed from my defense team.

D Hicks
DAVID HICKS

RE 4
Page 2 of 2

CS51
No col Dunn
9 Aug 04



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

23 July 2004

MEMORANDUM DETAILING DEFENSE COUNSEL

TO: Lieutenant Colonel Sharon Shaffer, Major Mark Bridges, Major Michael Mori, LCDR Philip L. Sundel, LCDR Charles D. Swift

SUBJECT: Detailed Defense Counsel

Consistent with my authority as Chief Defense Counsel and the provisions of sections 4C and 5D of Military Order No. 1, dated March 21, 2002, and section 3B of Military Commission Instruction # 4, dated 15 April 2004, the above named counsel are detailed and designated as follows:

United States v. Al Bahlul

Detailed Defense Counsel: LCDR Philip Sundel

Assistant Detailed Defense Counsel: Major Mark Bridges

United States v. Al Oosi

Detailed Defense Counsel: Lieutenant Colonel Sharon Shaffer

United States v. Hamdan:

Detailed Defense Counsel: LCDR Charles Swift

United States v. Hicks:

Detailed Defense Counsel: Major Michael Mori

Colonel Will A. Gunn, USAF
Chief Defense Counsel
Office of Military Commissions

Review Exhibit 5

Page 1 Of 4





DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600



28 November 2003

MEMORANDUM DETAILING DEFENSE COUNSEL

TO: Major Michael D. Mori, USMC

SUBJECT: Detailing Letter re Military Commission Proceedings of Mr. David Hicks

Pursuant to the authority granted to me by my appointment as Acting Chief Defense Counsel and Sections 4C and 5D of Military Order No. 1, dated March 21, 2002, you are hereby detailed as Military Counsel for all matters relating to Military Commission proceedings involving Mr. David Hicks. Your appointment exists until such time any findings and sentence become final as defined in Section 6(H)(2) unless you are excused from representing Mr. Hicks by me or my successor. I deem your detailing to be appropriate based on the government's assertion in enclosure (1) that on July 3, 2003, the President determined that Mr. Hicks is subject to the Military Order of November 13, 2001 and as such "shall when tried, be tried by military commission for any and all offenses triable by military commission that [he] is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death."

In your representation of Mr. Hicks, you are directed to review and comply with Presidential Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," (66 FR 57833); Military Commission Orders No. 1 and 2 and Military Commission Instructions 1 through 8 and all Supplementary Regulations and Instructions issued in accordance therewith. Specifically, you are directed to ensure that your conduct and activities are consistent with the prescriptions and proscriptions specified in Section II of the Affidavit And Agreement By Civilian Defense Counsel at Appendix B to Military Instruction No. 5.

You are directed to inform Mr. Hicks of his rights before a Military Commission. In the event that Mr. Hicks chooses to exercise his rights to Selected Military Counsel or his right to Civilian Defense Counsel at his own expense, you shall inform me as soon as possible. Consistent with paragraph 3B(8) of Military Instruction No. 4, I am detailing Master Sergeant Susan LaHoste as a member of the defense team to assist you in representing Mr. Hicks.

In the event that you become aware of a conflict of interest arising from the representation of Mr. Hicks before a Military Commission, you shall immediately inform me of the nature and facts concerning such conflict. You should be aware that in addition to your State Bar and Service Rules of Professional Conduct that by virtue of your appointment to the Office of Military Commissions you will be attached to the Defense Legal Services Agency and will be subject to professional supervision by Department of Defense General Counsel.



You are directed to inform me of all requirements for personnel, office space, equipment, and supplies necessary for preparation of the defense of Mr. Hicks.

Will A. Gunn

Colonel Will A. Gunn, USAF
Chief Defense Counsel (Acting)
Office of Military Commissions

Enclosure:

Target Letter re Mr. David Hicks dated November 28, 2003

cc:

MSgt [REDACTED]

Lt Col [REDACTED]

Col Borch

General Hemingway

Mr. Koffsky

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RE S



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

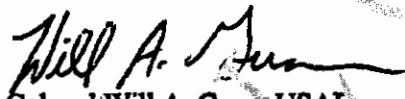
28 July 2004

MEMORANDUM DETAILING DEFENSE COUNSEL

TO: Major Jeffrey D. Lippert, USA

SUBJECT: Detailing of Assistant Detailed Defense Counsel to United States v. Hicks

Pursuant to the authority granted to me by my appointment as Chief Defense Counsel, Sections 4C and 5D of Military Commission Order No. 1, dated March 21, 2002, and Section 3E(8) of Military Commission Instruction No. 4, you are hereby detailed and designated as Assistant Detailed Defense Counsel for all matters relating to Military Commission proceedings involving Mr. David Hicks. Your appointment is effective 9 August 2004 and exists until such time any findings and sentence become final as defined in Section 6(H)(2) of Military Commission Order No. 1 unless you are excused from representing Mr. Hicks by me or my successor.


Colonel Will A. Gunn, USAF
Chief Defense Counsel
Office of Military Commissions

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RE 5





DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

Gen Hemmingsway



January 12, 2004

Joshua L. Dratel
14 Wall Street, 28th Floor
New York, NY 10005

Dear Mr. Dratel,

I am pleased to inform you that, based on the information provided and the determination by Defense Security Service, you have been qualified to represent Mr. David Hicks before Military Commissions.

Prior to beginning representation of Mr. Hicks you are required to furnish my office with a notice of appearance on behalf of Mr. Hicks and a signed copy of the enclosed Standard Form 312 (Non-Disclosure Agreement for Confidential Material). If you have any questions regarding your status or the requested/required documents please do not hesitate to contact my office at [REDACTED].

Sincerely,

Colonel Will A. Gunn (USAF)
Chief Defense Counsel
Office of Military Commissions

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Review Exhibit 6

Page 1 Of 1



UNITED STATES OF AMERICA

v.

DAVID M. HICKS

**Defense Objection to Placement of
Security Personnel in the
Commission Room**

23 August 2004

The Defense in the case of the *United States v. David M. Hicks* objects to the positioning of security personnel directly behind the Defense table during the Commission proceedings and states in support of this objection:

1. On 22 August 2004, the Assistant to the Presiding Officer held an administrative meeting for all counsel. During this meeting he informed the Defense that two (2) uniformed MPs, wearing MP brassards, would be positioned directly behind the Defense table within "arm's reach" of Mr. Hicks.
2. Notwithstanding the proposed instruction regarding Security Precautions set forth in the Trial Guide for Military Commissions (Draft of 21 August 2004), page 14, the Defense objects to the positioning of these security personnel in the Commission room.
3. Having security personnel in such close proximity to the accused has the potential of misleading the Commission members into thinking or believing Mr. Hicks either intends to or has a tendency to become violent or unruly, or otherwise needs security personnel watching him closely and ready, at a moments notice to subdue him.
4. Mr. Hicks has been in U.S. custody at Guantanamo Bay for approximately 2 years and 9 months. In that time he has been a model detainee. He has not engaged in any violent or aggressive behavior. He has adjusted well to his long detention, and is completely compliant to the directions of security personnel at all times.
5. There is no reason to believe he will behave differently during the Commission. Placing security personnel in such close proximity to Mr. Hicks and the defense team during the Commission sessions creates an appearance or perception that Mr. Hicks is a dangerous person. Such an appearance or perception is insidious and could, notwithstanding the proposed instruction, unfairly prejudice the accused.
6. In addition, the placement of security personnel in such close proximity to the accused will serve to chill the activities of the defense team at the counsel table during the Commission. With security personnel less than four (4) feet behind the backs of the defense team, there can be no private conversations between counsel or between counsel and the accused.

Review Exhibit 7

Page 1 Of 2

7. Such interference in the attorney-client relationship is prejudicial to Mr. Hick's receiving a full and fair trial.

8. The commander's operational considerations must be balanced against the right of Mr. Hick's to receive a full and fair trial. Here, there is no objective basis for placing security personnel in such close proximity to Mr. Hicks and the defense team. There is however a threat to Mr. Hicks receiving a full and fair trial. Accordingly, the security concerns of the commander must give way to the rights of Mr. Hicks.

9. Relief Requested: The Defense requests the security personnel be placed in a different position in the commission room so that Mr. Hicks' rights are not infringed upon.

10. Oral Argument: The Defense requests oral argument on this objection.

By:


M.D. MORI

Major, U.S. Marine Corps
Detailed Defense Counsel

Review Exhibit

7

Page 2 of 2

UNITED STATES

v.

DAVID MATTHEW HICKS
a/k/a Abu Muslim al Austraili
a/k/a Muhammed Dawood

CHARGES:
CONSPIRACY;
ATTEMPTED MURDER BY AN
UNPRIVILEGED BELLIGERENT;
AIDING THE ENEMY

David Matthew Hicks (a/k/a Abu Muslim al Austraili, a/k/a Muhammed Dawood) is a person subject to trial by Military Commission. At all times material to the charges.

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 3, 2003 that David Matthew Hicks (a/k/a Abu Muslim al Austraili, a/k/a Muhammed Dawood, hereinafter "Hicks") is subject to his Military Order of November 13, 2001.
2. Hicks' charged conduct is triable by a military commission.

BACKGROUND

3. Hicks was born on August 7, 1975 in Adelaide, Australia.
4. On or about May 1999, Hicks traveled to Tirana, Albania and joined the Kosovo Liberation Army (KLA), a paramilitary organization fighting on behalf of Albanian Muslims. Hicks completed basic military training at a KLA camp and engaged in hostile action before returning to Australia.
5. While in Australia, Hicks converted from Christianity to Islam. On or about November 1999, he traveled to Pakistan where, in early 2000, he joined a terrorist organization known as Lashkar e Tayyiba (LET), or "Army of the Righteous."
 - a. LET is the armed wing of Markaz Dawa al Irshad (a/k/a Markaz Jamat al Dawa), a group formed by Hafiz Mohammed Saeed and others.
 - b. LET's known goals include violent attacks against property and nationals (both military and civilian) of India and other countries in order to seize control of Indian-held Kashmir and violent opposition of Hindus, Jews, Americans, and other Westerners.
 - c. Starting around 1990, LET established training camps and guest houses, schools, and other operations primarily in Pakistan and Afghanistan for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of India and other countries.

Review Exhibit 8

Page 1 Of 5

- d. Since 1990, members and associates of LET have conducted numerous attacks on military and civilian personnel and property in Indian-controlled Kashmir and India.
 - e. In 1998, Saeed called for holy war against the United States after U.S. missile attacks against terrorist training facilities in Afghanistan killed LET members.
 - f. On April 23, 2000, in a bulletin posted on the internet, LET claimed that it recently killed Indian soldiers and destroyed an Indian government building, both in Indian Kashmir.
- 6. After joining LET, Hicks trained for two months at LET's Mosqua Aqsa camp in Pakistan. His training included weapons familiarization and firing, map reading and land navigation, and troop movements.
 - 7. Following training at Mosqua Aqsa, Hicks, along with LET associates, traveled to a border region between Pakistani-controlled Kashmir and Indian-controlled Kashmir, where he engaged in hostile action against Indian forces.
 - 8. On or about January 2001, Hicks, with funding and a letter of introduction provided by LET, traveled to Afghanistan to attend al Qaida terrorist training camps.
 - 9. On or about early December 2001, Hicks was captured near Baghlan, Afghanistan.

GENERAL ALLEGATIONS (AL QAIDA)

- 10. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.
- 11. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
- 12. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
- 13. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.
- 14. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

15. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.
16. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
17. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."
18. Since 1989 members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE 1: CONSPIRACY

19. David Matthew Hicks (a/k/a Abu Muslim al Austraili, a/k/a Muhammed Dawood, hereinafter "Hicks"), in Afghanistan, from on or about January 1, 2001, to on or about December 2001, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Muhammad Atef (a/k/a Abu Hafs al Masri), Saif al Adel, Usama bin Laden, and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
20. In furtherance of this enterprise and conspiracy, Hicks and other members of al Qaida committed the following overt acts:
 - a. On or about January 2001, Hicks, with funding and a letter of introduction provided by LET, traveled to Afghanistan to attend al Qaida terrorist training camps. Upon arriving in Afghanistan, Hicks went to an al Qaida guest house, where he met Ibrahim al Libi, a top-ranking al Qaida member, and others. Hicks turned in his passport and indicated that he would use the *kunya*, or alias, "Muhammed Dawood."
 - b. Hicks then traveled to and trained at al Qaida's al Farouq camp located outside Qandahar, Afghanistan. In al Qaida's eight-week basic training course, Hicks trained in weapons familiarization and firing, land mines, tactics, topography, field movements, and basic explosives.

- c. On or about April 2001, Hicks returned to al Farouq and trained in al Qaida's guerilla warfare and mountain tactics training course. This seven-week course included: marksmanship; small team tactics; ambush; camouflage; rendezvous techniques; and techniques to pass intelligence to al Qaida operatives.
- d. While Hicks was training at al Farouq, Usama bin Laden visited the camp on several occasions. During one visit, Hicks questioned bin Laden regarding the lack of English al Qaida training material; accepting bin Laden's advice, Hicks began to translate the training camp materials from Arabic to English.
- e. After Hicks completed his first two al Qaida training courses, Muhammad Atef (a/k/a Abu Hafs al Masri), then the military commander of al Qaida, summoned and interviewed Hicks about his background and the travel habits of Australians. Saif al Adel, then the deputy military commander of al Qaida, was also present at this interview. At the conclusion of this meeting, Muhammed Atef recommended Hicks for attendance at al Qaida's urban tactics training course at Tarnak Farm.
- f. On or about June 2001, Hicks traveled to Tarnak Farm and participated in this course. A mock city was located inside the camp, where trainees were taught how to fight in an urban environment. Training also included: marksmanship; use of assault and sniper rifles; rappelling; kidnapping techniques, and assassination methods.
- g. On or about August 2001, Hicks participated in an advanced al Qaida course on information collection and surveillance in an apartment in Kabul, Afghanistan. This course included "practical application" where Hicks and others conducted surveillance of various targets in Kabul, including the U.S. and British embassies, and submitted reports.
- h. Following the information collection and surveillance course, Muhammed Atef again interviewed Hicks, and asked if he would be willing to undertake a "martyr mission," meaning an attack wherein Hicks would kill himself as well as the targets of the attack.
- i. At an al Qaida guest house in Qandahar, as well as at al Qaida training camps and other locations in Afghanistan, Hicks received instruction from al Qaida associates on their interpretation of Islam, the meaning and obligations of *jiihad*, and other topics.
- j. On or about early September 2001, Hicks traveled to Pakistan to visit a friend. After watching television footage of the September 11, 2001 attacks on the United States, Hicks returned to Afghanistan to rejoin his al Qaida associates.
- k. Arriving in Qandahar, Afghanistan, Hicks reported to Saif al Adel, who was assigning individuals to locations where they were to fight alongside other al Qaida associates against U. S. and Coalition forces. Given a choice of three

different locations, Hicks chose to join a group of al Qaida fighters near the Qandahar Airport. Armed with an AK-47 automatic rifle, ammunition, and grenades, Hicks traveled with his al Qaida associates to the Qandahar Airport.

- l. On or about October 2001, after Coalition bombing operations commenced, Hicks joined an armed group outside the airport, where they guarded a Taliban tank.
- m. After guarding the tank for approximately one week, Hicks, still armed with the AK-47 rifle, ammunition, and grenades, traveled with an LET acquaintance to Konduz, Afghanistan, arriving around November 9, 2001. There, he joined others, including John Walker Lindh, who were engaged in combat against Coalition forces.

**CHARGE 2: ATTEMPTED MURDER BY AN
UNPRIVILEGED BELLIGERENT**

21. David Matthew Hicks (a/k/a Abu Muslim al Austraili, a/k/a Muhammed Dawood), in Afghanistan between on or about September 11, 2001 and December 1, 2001, as a perpetrator, co-conspirator, member of an enterprise of persons who shared a common criminal purpose, an aider or abettor, or some combination thereof, attempted to murder divers persons by directing small arms fire, explosives, and other means intended to kill American, British, Canadian, Australian, Afghan, and other Coalition forces, while he did not enjoy combatant immunity and such conduct taking place in the context of and associated with armed conflict.

CHARGE 3: AIDING THE ENEMY

22. David Matthew Hicks (a/k/a Abu Muslim al Austraili, a/k/a Muhammed Dawood), in Afghanistan between on or about January 1, 2001, and December 1, 2001, intentionally aided the enemy, to wit: al Qaida and the Taliban, such conduct taking place in the context of and associated with armed conflict.

Biographical Summary

Peter E. Brownback III

Born 22 October 1947 in Philadelphia, PA. Graduated from Johns Hopkins University in Baltimore, MD, in June 1969 with a Bachelors of Arts in International Affairs.

Received a Regular Army commission as an infantry officer in June 1969. After initial officer training, assigned as a platoon leader in 3/325 PIR, 82d Abn Div, Fort Bragg, NC from October 1969 to February 1970.

Vietnam service from June 1970 - June 1971 as an infantry platoon leader, armored cavalry platoon leader, and battalion S-1, all with the 173d Airborne Brigade.

Served with 5th Special Forces Group at FBNC from June 71 to February 1973 as an A Detachment Commander and Battalion S-3.

Infantry Officer Advanced Course -- June 1973 - May 1974.

Funded Legal Education Program student at TC Williams School of Law, University of Richmond, 1974-77. Summers at Fort Lee working as assistant trial and assistant defense counsel. Admitted to Virginia Bar, June 1977.

Assigned to Office of the Staff Judge Advocate, 82d Airborne Division, FBNC, 1977-1980. Trial Counsel, Chief Administrative Law, Chief Military Justice.

Senior Defense Counsel, Fort Meade, MD. 1980-81.

Operations Officer, US Army Trial Defense Service, Falls Church, VA. 1981-84.

Legal Advisor/Legal Instructor, USAJFK Center for Special Warfare, FBNC, 1984-85.

Legal Advisor, Joint Special Operations Command, FBNC, 1985-88.

Senior Military Judge, Mannheim, FRG, 1988-1991.

Director of Legal Operations, JSOC, FBNC, Jan 91 - Apr 91.

Staff Judge Advocate, 22d SUPCOM/ARCENT Forward, Dhahran, KSA, May 91 - May 92.

Chief Circuit Judge, 2d Judicial Circuit, FBNC, 1992 - 1996.

Chief Circuit Judge, 5th Judicial Circuit, Mannheim, FRG, 1996 - 1999.

Entered on the retired rolls on 1 July 1999.

Recalled to active duty on 14 July 2004.

Review Exhibit 9

Page 1 Of 13

AWARDS: Combat Infantryman's Badge, Special Forces Tab, Ranger Tab, Master Parachutist Badge, DSM, LOM x 3, BSM x 5, MSM x 2, JSCM x 2, ARCOM x 2, AAM, JMUA x 2, NDSM, VSM, SWABS, HSM, RVNGCUC, RVNCAMU, KUKULISM

PERSONAL: Married to LTC [REDACTED], USA (Ret).

[REDACTED] - born [REDACTED]
[REDACTED] - born [REDACTED]

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Review Exhibit 9

Page 2 Of 13

**Voir Dire Question Prepared by Presiding Officer, COL Peter E. Brownback
(Taken from the Draft Trial Guide.)**

1. I do not know any accused whose case has been referred to the Commission.
2. I do not know any person named in any of the charges.
3. Of the names of witness I have seen so far, I do not recognize any of their names.
4. I do not have any prior knowledge of the facts or events in this case that will make me unable to serve impartially.
5. I do not know, and have no command relationship with, any other member.
6. I believe that I can vote fairly and impartially notwithstanding a difference in rank with other member. I will not use my rank to influence any other member.
7. I have not had any dealings with any of the parties to the trial, to include counsel for both sides, that might affect my performance of duty as a Commission member in any way.
8. I have not had any prior experience, either personal or related to my military duties, that I believe that would interfere with my ability to fairly and justly decide this case.
9. No family member, relative, or close friend that I am aware of was the victim of the events of 9-11, and has not been the victim of any alleged terrorist act. I have been told that a former Judge Advocate General's Corps officer was on one of the planes which hit the World Trade Center. This officer was assigned to Fort Bragg at some time during the period 1984 to 1988, while I was assigned there. I do not recall the last time I saw the officer, nor do I recall his name. He was not assigned to the same unit(s) to which I was assigned, although we met, I feel certain, at one or more of the judge advocate functions on base. After my wife left Fort Bragg in 1987 for Charlottesville, I had no further occasion to see or meet this officer.
10. I have seen and heard general media reporting about the events of 9-11, al Qaida, Usama Bin Laden, and terrorism on broadcast TV and the various newspapers. Nothing I have seen or read will have any effect on my ability to perform the duties as a Commission member fairly and impartially.
11. I promise as a Commission Member that I will keep an open mind regarding the verdict until all the evidence is in.
12. I know and respect that the accused is presumed innocent and this presumption remains unless his guilt is established beyond a reasonable doubt. I know and respect that the burden to establish the guilt of the accused is on the prosecution. I agree to be guided by and follow these principles in deciding this case.
13. I have nothing of either a personal or professional nature that would cause me to be unable to give my full attention to these proceedings throughout the trial.

Review Exhibit 9

Page 3 Of 13

14. I am not aware of any matter that might raise a question concerning my participation in this trial as a Commission member.

Peter E. Brownback III
Colonel, USA

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Review Exhibit 9

Page 4 Of 12

Presiding Officer Voir Dire Addendum - Relationship with Other Personnel

a. Mr. Haynes: I believe that I once met the General Counsel at the Army's Judge Advocate General's School in 1996 or 1997 as part of an organized run. We exchanged perhaps ten minutes worth of casual chit-chat during the run. Other than that, I have had no contact with Mr. Haynes.

b. Mr. Altenburg:

1. I first met (then) CPT Altenburg in the period 1977-78, while he was assigned to Fort Bragg. My only specific recollection of talking to him was when we discussed utilization of courtrooms to try cases.

2. To the best of my knowledge and belief, I did not see or talk to Mr. Altenburg again until sometime in the spring of 1989 at the Judge Advocate Ball in Heidelberg. Later, in November-December 1990, (then) LTC Altenburg obtained Desert Camouflage Uniforms for COL [REDACTED] and me so that we would be properly outfitted for trials in Saudi Arabia.

3. During the period 1992 to 1995, (then) COL Altenburg was the Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg while I was the Chief Circuit Judge, 2nd Judicial Circuit, with duty station at Fort Bragg. Our offices were in the same building. My wife, (then) MAJ [REDACTED] was the Chief of Administrative Law in the SJA office from [REDACTED]. During this period, Mr. Altenburg and I became friends. We saw each other about twice a week and sometimes more than that. We generally attended all of the SJA social functions. He and his wife (and children - depending upon which of his children were in residence at the time) had dinner at our house at least three times in the three years we served at Fort Bragg. I attended several social functions at his quarters on post. Though he was a convening authority and I was a trial judge, we were both disciplined enough to not discuss cases. I am sure there were times when he was not pleased with my rulings.

4. From summer 1995 to summer 1996 when Mr. Altenburg was in Washington and I at Fort Bragg, he and I probably talked on the telephone three or four times. I believe that he stayed at my house one night during a TDY to Fort Bragg (but I am not certain.).

5. During the period June 1996 to May 1999, I was stationed at Mannheim, Germany and Mr. Altenburg was in Washington. Other than the World-Wide JAG Conferences in October of 1996, 1997, and 1998, I did not see nor talk to MG Altenburg except once -- in May of 1997, I attended a farewell dinner hosted by MG Altenburg for COL [REDACTED]. In May 1999, MG Altenburg presided over my retirement ceremony at The Judge Advocate General's School and was a primary speaker at a "roast" in my honor that evening.

Review Exhibit 1

Page 5 Of 12

6. Since my retirement from the Army on 1 July 1999, Mr. Altenburg has never been to our house and we have never been to his. From the time of my retirement until the week of 12 July 2004, I have had the occasion to speak to him on the phone about five to ten times. I had two meetings or personal contacts with him during that period. First, in July or August 2001 when I was a primary speaker at a "roast" in MG Altenburg's honor at Fort Belvoir upon the occasion of his retirement. Second, in November (I believe.) 2002, I attended his son's wedding in Orlando, Florida.

7. I sent him an email in December 2003 when he was appointed as the Appointing Authority to congratulate him. I also sent him an email in the spring of 2004 when I heard that he had named a Presiding Officer. Sometime in the spring of 2004, I called his house to speak to his wife. After we talked, she handed the phone to Mr. Altenburg. He explained that setting up the office and office procedures was tough. I suggested that he hire a former JA Warrant Officer whom we both knew.

8. To the best of my memory, Mr. Altenburg and I have never discussed anything about the Commissions or how they should function. Without doubt, we have never discussed any case specifically or any of the cases in general. I am certain that since being appointed a Presiding Officer we have had no discussions about my duties or the Commission Trials.

c. BG Hemingway: I had never met, talked to, or otherwise communicated with BG Hemingway until I reported on 14 July 2004.

d. Members: I have never met or talked to any of the other members of the commission. I have emailed instructions to all of them and received email receipts from all of them. A copy of what I sent to the members was provided to all counsel.

18 August 2004

Subject: Questionnaire #2 - Presiding Officer Voir Dire

1. I have received questions from counsel in Al Bahlul, Hamden, and Hicks. Many of the questions are the same or so nearly the same as to make no difference. I am answering these questions by this memorandum.

2. I refer all counsel to MCO #1, para 6B(1) and (2) - the commission is to provide a full and fair trial, impartially and expeditiously. Further, MCI # 8, para 3A(2), states that questioning of the members, to include the Presiding Officer, shall be narrowly focused on issues pertaining to whether good cause may exist for removal of any member.

3. Professional Background --

a. I have served in close ground combat only in Vietnam - where I was a rifle platoon leader and an armored cavalry platoon leader. I do not remember having any occasion to deal with enemy prisoners - either by capturing them or being involved in trying them or questioning them. However, I did work with former Viet Cong who had come over to the ARVN.

b. During my time as an infantry officer and a judge advocate, I attended many courses - some of which focused on the law of war and international law. I do not recall the where/when's for these courses. I taught various aspects of international law and law of war at the JFK Special Warfare Center for a year. To the best of my knowledge, I have not attended any courses focusing on LOAC or IL since 1984/85. However, during various presentations at general courses, I may have had some exposure to these subjects.

c. I have not received any specialized training, formal or informal, on Al Qaeda, the Taliban, Islamic Fundamentalism, or detainee operations. I have had the occasion to read newspaper and news magazine accounts of various aspects of the topics above. I also have read some articles published in the Army War College journal and the Military Law Review. Additionally, I have read numerous articles on various topics while surfing the web.

d. I am generally aware of the conduct of operations in Afghanistan and Iraq. I am interested in such operations. I have had occasion to look at the DOD website on Military Commissions. I have not seen any of the data or articles on detainee operations.

e. I have not written for publication or spoken publicly about any of the topics in paragraph 3c above.

f. I am and have been an associate member of the Virginia State Bar since 1977. I have never practiced law in the civilian sector.

4. Personal Background:

Review Exhibit 7

Page 7 Of 12

a. I was raised as a Christian. I do not attend church regularly. I have no antipathy towards Islam, or any of the other major religions. My knowledge of Islam is based primarily upon my readings and my dealings with Saudis, Kuwaitis, and others during my tour in Saudi Arabia in 1991-92. I am not an expert in the area of Islam, although I have some knowledge. I do own a Qur-An, but I do not profess to be a student of the Qur-An.

b. I entered onto the retired rolls on 1 July 1999. I intended to be retired. However, I soon discovered that I was slightly bored. Consequently, at the urging of my wife, I took several part-time jobs. These included being an enumerator for the 2000 Census, a safety person for beach renewal operations, an instructor for an SAT prep course, and an instructor at a local college. I enjoyed all of the jobs and I regretted having to quit two of them upon my recall to active duty.

c. My hearing is within deployment standards. I do not like to have people mumble - I prefer that they speak with a command voice. There is no impairment.

d. **Caveat - see 4e, below.** I belong to several military professional organizations and to various social organizations. None of them is political in nature. I do not attend meetings.

e. I do belong to a local community organization which supports various propositions involving local city management and zoning. It is political only in the sense that it wants voters to vote in accordance with its recommendations - most of which are simply anti-over-development. I have attended at least three of its meetings when the topic was one of interest to me.

f. I am registered to vote. My Voter Registration Card shows NPA in the Party block. I have not campaigned for anyone.

5. Effect of 9/11 and other events:

a. See Questionnaire #1 for the only person I knew who was killed on 9/11.

b. I knew and know many people in the Pentagon. I did not have any personal friends who were killed or injured there; however, I did have friends who were in the building when the plane hit.

c. I have many friends and others who have been stationed in Afghanistan and Iraq. I am aware of the impact of war upon soldiers and their families.

d. There was no specific impact of 9/11 and related events upon me or my family.

6. Mr. [REDACTED]

a. I first became aware of [REDACTED] in [REDACTED] Counsel at [REDACTED]. The post stockade served many posts along the east coast. One of those posts was [REDACTED], where CPT [REDACTED] was a prosecutor. He was the lead prosecutor on a murder case - I became involved in the case through my dealings with the DC at [REDACTED].

b. I next saw LTC [REDACTED] when he was the [REDACTED] in [REDACTED] and I was one of the military judges at [REDACTED]. We had numerous professional contacts and we may have been at two or three social functions together.

c. In 1992, I became the Chief Circuit Judge, [REDACTED] Judicial Circuit, [REDACTED]. [REDACTED] was LTC (later COL) [REDACTED]. We worked closely together - via telephone and electronic bulletin board (precursor to email) - until his departure for [REDACTED] in [REDACTED]. During this period, I only saw him at judicial training functions and on one occasion when I promoted him to Colonel.

d. From 1995 to 1996, COL [REDACTED] and I talked and exchanged emails routinely on various matters. We worked on the [REDACTED] together and we helped each other with various case-related problems. I saw COL [REDACTED] once, during a judicial training function.

e. From 1996 until my retirement in 1999, COL [REDACTED] and I continued to exchange ideas, suggestions, instructions, and the like by email. I saw him three times at judicial training functions.

f. Upon my retirement in 1999, COL [REDACTED] and I had few occasions to exchange email or telephone calls while he was at [REDACTED]. However, after he retired in [REDACTED], he visited us on several occasions while going to see his parents, who live about [REDACTED] miles from us. On one occasion, he and my wife went deep sea fishing together. When Mr. [REDACTED] would come across a criminal law case which he thought would interest me, he would forward it to me.

g. During the period after the announcement of the Military Commissions in 2001, Mr. [REDACTED] and I discussed the commissions on at least one occasion. He knew that I had put my name in for consideration. On 29 June 2004, I received an email from LTC [REDACTED] at OMC. In it he stated that the Appointing Authority was considering hiring a Legal Advisor to the Presiding Officer and asked if I had any recommendations. I immediately gave him Mr. [REDACTED] name, because:

- 1) I was personally familiar with Mr. [REDACTED] work and work ethic.
- 2) I was personally familiar with Mr. [REDACTED] knowledge of criminal law and procedure.
- 3) I was personally familiar with Mr. [REDACTED] ability to write, edit, and publish procedural matters.

Review Exhibit 7

Page 9 Of 15

4) I was aware of Mr. [REDACTED] performance as a military judge, both the highs and the lows.

LTC [REDACTED] asked me for Mr. [REDACTED] contact information and I gave it to him. Subsequently, the Appointing Authority, UP MCO #1, executed a detailing agreement with the Federal Law Enforcement Training Center - whereby Mr. [REDACTED] would be detailed to OMC for a year. While Mr. [REDACTED] is paid by DHS, his employer is OMC. During the period of the detail, Mr. [REDACTED] primary focus is OMC. Mr. [REDACTED] has distributed a copy of the detailing agreement to all counsel.

h. Once LTC [REDACTED] and Mr. [REDACTED] talked, I talked to Mr. [REDACTED] and pointed out some of the problem areas in working with the commissions. He eventually decided to accept the detail.

i. Since 15 July 2004, Mr. [REDACTED] has been part of the procedural preparation for the proceedings before the commissions. He has written procedures, written emails, written memoranda, and prepared various drafts. All of this has been done under my supervision. Mr. [REDACTED] has also prepared memoranda and drafts which he forwarded to the Appointing Authority concerning procedural aspects of the commissions. He did this with my knowledge and consent, but acting for the Appointing Authority. To my knowledge, Mr. [REDACTED] has had many communications with OMC personnel - most by email. I am not aware of any communications between Mr. [REDACTED] and any members of OGC. All of Mr. [REDACTED] communications with OMC personnel were in the area of procedural and logistic preparation for commission proceedings. I believe that it is entirely appropriate for Mr. [REDACTED] to discuss and make recommendations for procedural changes or structure so that the commission process may function efficiently and expeditiously.

j. Mr. [REDACTED] and I have never discussed the substance of any of the cases currently referred to the commission for trial. We have never discussed MCI #2. All of our discussions, efforts, and work have been focused on the procedural requirements to get cases before the commission.

k. I have never had an *ex parte* discussion with Mr. [REDACTED] concerning any of the cases referred to the commission.

7. Selection as Presiding Officer:

a. Sometime in the spring of 2002, I was told by someone that the Presiding Officers of the Military Commissions could be retired officers who were recalled to active duty. I discussed this with COL [REDACTED].

b. In January 2003, I got a call from OCTJ, informing that if I wanted to put my name in for PO, I had to send in a statement. I did and I did.

Review Exhibit 9

Page 10 Of 13

c. In December 2003, I read that MG (Ret.) Altenburg had been named the Appointing Authority. In January I received a call from OCTJ wanting to know if I, among others, was still interested. I was.

d. On 24 or 25 June 2004, I got a call from LTC [REDACTED] at OMC. He wanted to know if I was still interested. I was. He told me that an announcement would be made quickly. On 28 June I got four phone messages that some PAO wanted to read me a press release so that I could okay it. I never found the PAO. On 29 June 2004, the announcement was made.

e. MG (Ret.) Altenburg knew that I was interested in being on one of the commissions.

e. That is all I know about the selection process.

8. Military Commissions:

a. The Presiding Officer has specifically designated roles and duties under MCO #1 and the MCI's. Those roles and duties are different, in many ways, from those of the other members of the commission. In some areas, MCO #1 and the MCI's give the Presiding Officer the authority to act for the commission without the formal assembly of the full commission. Under the President's Military Order, the Presiding Officer can be overruled by a majority of the commission in certain areas. For a full explanation of the Presiding Officer's powers, see MCO #1 and the MCI's. As the only member of the commission who is a judge advocate, I will tell the commission what I believe the law to be. However, the President's Military Order states that the commission will decide all questions of law and fact. As with all matters of law, I invite counsel to provide motions and briefs so that I may become better informed - I note that there have been no motions or notice of motions to date on any legal topics.

b. Addressing a specific question, I did in fact state: "Perhaps a better way of looking at the matter is to say that I have authority to order those things which I order done." I then went on to say that this was based on my interpretation of the law and that my interpretation would be the one that counted "until superior competent authority (The President, The Secretary of Defense, The General Counsel of the Department of Defense, The Appointing Authority) issues directives stating that what I am doing is incorrect." Based on a directive from the Appointing Authority, I did not and will not hold commission sessions without the full commission. This directive did change my opinion concerning my ability to hold sessions without the full commission.

c. Based on my interpretation of the MCO and MCI's, the standard for whether or not a member should sit is whether there is good cause to believe that the member can not be fair and impartial and provide a full and fair trial. The determination as to whether there is good cause to relieve a member is made by the Appointing Authority. If I believe that there is good cause to relieve me or any other member, I am required to forward that information to the Appointing Authority for his decision.

d. I have had the occasion to review various material about military commissions. The commentary on commissions and the legality thereof is about what one would expect - a lot pro, a lot con. The commentary ranges from the legality of the commissions to the structure of the commissions to the law governing the establishment and operation of the commissions. Until these areas have been thoroughly briefed by counsel, I reserve my opinion.

e. Any service member has the right and duty to disobey an unlawful order or general order or regulation. However, the standard under Article 92 is quite high. Obviously, if the order or regulation is patently illegal, the source of the order or regulation does not mitigate the illegality.

f. Counsel are encouraged to provide briefs on the issue of "declaring an order or regulation" unlawful by the Presiding Officer of a commission. I am not prepared to address the issue at this time.

9. Personal Knowledge of Cases:

a. I have read the charge sheets in all four cases which are presently referred to the commission for trial. That is all that I have read or know about any of the cases. I have not seen the Presidential Determinations in the cases. I have not discussed the facts of the cases with anyone - either in my personal or professional capacity. Until I received the charge sheets, I had never heard the names of any of the defendants.

b. If the Prosecution proves all of the elements of an offense beyond a reasonable doubt, then a vote for a guilty finding would be appropriate. If not, then a vote for a not guilty finding would be appropriate.

c. As to the responsibility for the acts of 9/11 and others, the only knowledge I have of the acts and the perpetrators is open news media. If one were to believe what one reads, then it would appear that members of Al Qaeda were responsible for the attacks. I have no opinion as to the actions of specific individuals.

10. General:

a. My participation as a member and Presiding Officer in this commission will have an impact on my personal life. It will have no impact on my professional life - I do not have a professional life. Once these proceedings are finished, I will retire again.

b. Media interest in the case will not have an impact on how I perform my duties.

c. Other than memoranda and emails from OMC - on which counsel were cc'd, I have received no instructions, hints, suggestions, or any other form of communication from anyone in any governmental position (to include OMC and OGC) concerning what I should do as a Presiding Officer in these proceedings. Based on my personal and

professional knowledge of Mr. Altenburg, my belief is that he wants to have these cases tried fully and fairly. I have not discussed my role as Presiding Officer with Mr. Altenburg at all.

d. I am not aware of any matter which might cause a reasonable person to believe that I could not act in a fair and impartial manner in these proceedings.

Peter E. Brownback III
COL, JA
Presiding Officer

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Review Exhibit 9

Page 13 Of 13

**REVIEW EXHIBIT 10 IS THE VOIR DIRE
CONDUCTED ON 25 AUG 04.**

**THE FULL TRANSCRIPT IS AVAILABLE AT
WWW.DEFENSELINK.MIL**

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